REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
NORTH GAUTENG HIGH COURT, PRETORIA

30/08/2013

CASE NO: 1006/2013

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

30 AUGUST 2013 FHD VAN OOSTEN

In the matter between:

BIZ AFRIKA 1049 (PTY) LTD (IN LIQUIDATION) — PLAINTIFF

and

FUCHS ROUX INC — DEFENDANT

J U D G M E N T

VAN OOSTEN J:

[1] This is an opposed application for summary judgment. The plaintiff claims a total amount of R1 566 197,08, together with *mora* interest thereon from the defendant, an incorporated firm of attorneys. The defendant has filed an opposing affidavit dealing at length with its alleged *bona fide* defence to the plaintiff's claim. The plaintiff persists in

its application for summary judgment for a reduced amount of R1 025 000,00, in terms of Rule 32(6)(b)(ii).

[2] The common cause facts of the matter are these. Biz Afrika 1049 (Pty) Ltd (Biz), the registered owner of the immovable property known as Erf 87 Newmark Estate, ("the property") on 9 September 2011, and in terms of a written agreement, sold the property including a building contact to one Luan Neethling (the purchaser) for a purchase consideration of R1 750 000,00. The firm of conveyancers nominated in the agreement was Burger Attorneys who in turn instructed Ms Hartley who was employed by the defendant, and who is also the deponent to the defendant's affidavit resisting summary judgment, to proceed with the transfer. Ms Hartley, however, acted on instructions directly given to her by Mr Diedericks, who at all times acted on behalf of Biz.

[3] The transaction was lodged with Registrar of Deeds, Pretoria, on 8 May 2012, was rejected and upon re-lodgement registration of transfer of the property occurred on 30 May 2012. On 11 May 2012 the defendant received a letter of demand from the plaintiff's attorneys, who at that time were acting for a creditor of Biz, Bridgelink (Pty) Ltd. In the letter the defendant was informed that an urgent application for the liquidation of Biz would be issued that same morning, that the date of the letter in terms of s 348 of the Companies Act 1973 (the Act), would therefore be the date of liquidation and that any payments, on behalf of Biz concerning the transaction, henceforth made by the defendant would be at their sole risk. Ms Hartley sought and obtained instructions from Diedericks to proceed with the transfer of the property. On 14 May 2012 the plaintiff's attorneys repeated their earlier warning to Ms Hartley not to pay out the proceeds of the sale of the property. In this letter Ms Hartley is informed that the urgent application was issued on 11 May 2012 and set down for hearing on 22 May 2012. A copy of the liquidation application that had been issued was annexed to this letter. Ms Hartley once again discussed the letter with Diedericks who instructed her to proceed with the transfer of the property and insisted that she was obliged to act in accordance with his instructions on behalf of Biz, unless a court order to the contrary was issued. On 4 June 2012 Ms Hartley received a letter from the provisional liquidators informing her that an order for the provisional liquidation of Biz had been granted on 25 May 2012 and that they had duly been appointed provisional liquidators by the Master, in confirmation of which a copy of the order was attached to the letter. The letter further confirms that

transfer of the property had been effected and demands that the proceeds of the sale were to be paid to the liquidators and not to Biz or any third party.

[4] In the affidavit resisting summary judgment Ms Hartley accounts as follows in respect of payments made from the receipt by the defendant in its trust account of the amount of R1 298 802,92 on 30 May 2012, representing a portion of the purchase price in respect of the property. On 31 May 2012 the amount of R742 600,00 to the builders of the house on the property and the amount of R100 000,00 to the estate agents in respect of their commission, on 5 June 2012 an amount of R2 400,00 to the purchaser, on 7 June 2012 the amount of R183 802,92 into the bank account of the plaintiff as nominated by the liquidators, on 14 June 2012 by agreement between the purchaser and the builders, R160 000,00 from retention monies to the builders and R20 000,00 to the purchaser.

[5] In summary, as is apparent from what I have set out above, the total amount of R1 025 000,00 was paid to beneficiaries other than the liquidators of Biz (which constitutes the reduced amount the plaintiff now claims), of which R842 600,00 was paid by Ms Hartley before she was formally advised of the liquidation order and R182 400,00 after being so informed. The liquidators on the other hand, only received the amount of R183 802,92.

[6] This brings me to the cause of action relied on by the plaintiff in the particulars of claim. Premised on the date of the granting of the provisional liquidation order, being 25 May 2012, the plaintiff pleads that on 30 May 2012 (which is the date of receipt of a portion of the purchase price by the defendant in trust), firstly, the mandate which Biz had given to the defendant was terminated by the operation of the law, secondly, any disposition of the proceeds of the sale of the property under the mandate was void pursuant to the provisions of s 341(2) of the Act, and thirdly and lastly, the fiduciary relationship which had existed between plaintiff and the defendant regarding the proceeds of the sale of the property continued to exist and that the defendant had a duty of care towards the liquidators of Biz to deal with such proceeds only on their duly authorised instructions, which could only be given after their appointment as provisional liquidators by the Master. The defendant's liability to pay the balance of the purchase

consideration to the liquidators, finally, the concluding paragraph of the particulars of claim, is based on the defendant's breach of its fiduciary duty to the plaintiff.

[7] The essential point of departure, in the view I take of the matter, is to consider the payments made by Ms Hartley after she had properly been informed of the liquidation of Biz. The amount we are here concerned with, as I have already dealt with, is R182 400,00. Counsel for the plaintiff, in the alternative, in the event of leave to defend being granted on the amounts paid prior to this date, asked for summary judgment for this amount together with the costs of the application (the alternative claim).

[8] All the facts concerning the alternative claim have been disclosed in the papers before me. In addition to what I have already set out above, Ms Hartley in no uncertain terms, concedes that 'At that point in time I laboured under the *bona fide* but mistaken belief that the honouring of contracts entered into before the date of liquidation was allowed. I am now informed that the respondent was not suppose (sic) to pay this amount to the purchaser, Mr Neetlingh', and 'I am advised that the respondent was also not suppose (sic) to pay the amounts of R160 000,00 and R20 000,00 with knowledge of the liquidation order'.

[9] The alleged *bona fides* of Ms Hartley, assuming that it did exist, does not avail the defendant. She was pertinently informed by way of a copy of the court order that an order for liquidation of Biz had been granted. The only 'defence' proffered in the affidavit is that the plaintiff has not suffered damages as it was incumbent on the plaintiff to have recovered the amounts from the end-beneficiaries thereof, which it has failed to do. The contention was echoed in counsel for the defendant's argument. It is without merit and falls to be rejected. Counsel for the plaintiff specifically for the purpose of this application, relied on the *ex lege* termination of the defendant's mandate, as pleaded. In support of the contention counsel relied on the judgment of Zulman J (as he then was) in *Klein NO v South African Transport Services and others* 1992 (3) SA 509 (W) 513G-I and 514A-B, where the learned Judge having referred to *Walker v Syfert NO* 1911 AD 141 at 166 concluded:

'The hand of the law, as it were, was laid on the insolvent's estate when he was finally sequestrated, and that hand was the hand of the trustee who was henceforth the person who was in charge of the direction of the insolvent's affairs and business in general, and in particular in regard to the type of matter with which I am now concerned.'

The learned Judge further (at 514A) in effect confirmed the concept of *concursus creditorum* and in particular, the legal principle concerning termination of a mandate by insolvency in holding that the sequestration of the debtor's estate in that matter terminated whatever authority Trust Bank might have had from the insolvent to make a certain payment. In *Administrator Natal v Magill & Nel (Pty)* Ltd *(in liquidation)* 1969 (1) SA 660 (A) the facts the then Appellate Division dealt with were that the respondent company had prior to its liquidation, contracted with the appellant to build a school. After its liquidation the appellant elected to make certain payments to certain sub-contractors and deducted these amounts from the amount due to the respondent. In the majority judgment the appellant's right to pay sub-contractors directly after liquidation was held to have been defeated by the liquidation of the respondent. Applied to the facts of the present matter the defendant in making the payments acted without any authority to do so and in fact contrary to the specific instructions of the liquidators. Counsel for the defendant submitted that there was no evidence of vicarious liability. The contention flies in the face of the defendant's letters annexed by Ms Hartley and in any event was not raised by her at all. The defendant has failed to disclose a defence to the alternative claim and I am satisfied that the plaintiff has established an unanswerable case (cf *Edwards v Menezes* 1973 (1) SA 299 (NC)). No grounds have been advanced in support of exercising my residual discretion to refuse summary judgment. It follows that the plaintiff is entitled to summary judgment on the alternative claim.

[10] It remains to deal with the remainder of the plaintiff's claim. In this regard the decisive consideration having persuaded me to grant leave to defend is the absence of knowledge by Ms Hartley of the liquidation order having been granted when these payments were made. Although this aspect was hotly debated before me and Ms Hartley's professed ignorance justifiably criticised I refrain from expressing any final views thereon. Suffice to say that, for purposes of this application, the facts are such as to persuade me to exercise my residual discretion in favour of granting the defendant leave to defend the remainder of the action.

[11] In the result I make the following order:

1. Summary judgment is granted against the defendant in favour of the plaintiff for:
   - 1.1 Payment of the sum of R182 400,00.
   - 1.2 Interest on the amount in 1.1 above at the rate of 15,5 % *pa* from 4 June 2012 to date of final payment.
   - 1.3 Costs of the application for summary judgment.
2. The defendant is granted leave to defend the remainder of the plaintiff's action.

~~F~~HD VAN OOSTEN
JUDGE OF THE HIGH COURT

COUNSEL FOR PLAINTIFF	***ADV F DU TOIT SC***
ATTORNEYS FOR PLAINTIFF	***STRYDOM & BREDENKAMP INC***
COUNSEL FOR RESPONDENT	***ADV JD MARITZ SC***
ATTORNEYS FOR RESPONDENT	***GILDENHUYS MALATJI INC***
DATE OF HEARING	***26 AUGUST 2013***
DATE OF JUDGMENT	***30 AUGUST 2013***