IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT, PRETORIA)

4/8/2009

CASE NO: 35649/2009

In the matter between:

ANVER MOHAMMED MOTALA N.O — FIRST APPLICANT

NOMVUYO YVONNE SERITI N.O. — SECOND APPLICANT

In their capacity as liquidators of Hua Wei Manufacturing

(Pty) Ltd (in liquidation))

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/~~NO~~.

(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~.

(3) REVISED.

2009-08-04

DATE — SIGNATURE

And

Mineral-Loy (Pty) Ltd — RESPONDENT

And

CASE NO: 35953/2009

In the matter between:

ANVER MOHAMMED MOTALA N.O — FIRST APPLICANT

NOMVUYO YVONNE SERITI N.O. — SECOND APPLICANT

(In their capacity as liquidators of Hua Wei Manufacturing

(Pty) Ltd (in liquidation))

And

JOFIDA CONSTRUCTOIN (PTY) LTD RESPONDENT

JUDGMENT

MAVUNDLA, J.,

[1] I have decided, for sake of convenience, to combine the above matters, and give one consolidated judgment because the relief sought in each matter is premised essentially on similar facts and principles. Save for the amounts sought and the respective respondents, to a great extent the facts are the same. Besides, the applicants in both matters are the same. Both matters are unopposed, although the papers were served on the respective respondents.

[2] The applicants are the appointed joint liquidators of Hua Wei Manufacturing Company (Pty) Ltd in liquidation. I shall

henceforth refer to this company as WHM. The applicants have brought under the respective case numbers referred to herein above, against the respective respondent, seeking an order in terms of which, in respect of:

(a) case number 35949/09:

(1) that the payment of R16 526. 58 on 17 November 2007 and R13 699. 38 on 28 November 2007 to the respondent constitute a disposition of the property of HW M (in liquidation), after commencement of the winding-up in terms of section 341(2) of the Companies Act 61 of 1973.

(2.) That judgment be granted against the Respondent for the amount t of R30 225. 58.

(3.) That the Respondent be ordered to pay interest on each respective amount at rate of 15.5% per annum *a tempore morae.*

(4.) In the alternative to prayer 1 and 2 that payment of the respective amounts on 17 November 2007 and 28 November 2007 to the Respondent be set aside as an impeachable disposition of the property of the insolvent estate of HWM in terms of section 26 alternatively in terms of section 29 alternatively section 30 of Insolvency Act 61 of 1973.as preferential disposition.

(5.) That the Respondent be ordered to pay the interest on the amount received from date of payment thereof, to date of judgment at a rate of 15.5% per annum

(6.) Costs of suit.

(b) In respect of case 35953/2009, the claim is for the amount of R56 475. 14 paid to the Respondent on 30 November 2007. The prayers are identical as those set out herein above in respect of case number 35949/2009.

[4] The background facts is fully set out in the affidavit of Mr. Deon Marius Botha, an insolvency practitioner, who has been appointed by both the applicants to assist them in the administration of the liquidated estate of Hua Wei Manufacturing Company (Pty) Ltd (in liquidation).

[5] Botha has been appointed as the joint liquidator of Malokiba Trading 19 (Pty) Ltd. The latter company is also one of the companies that signed together with WHM a "Sale of Shares and Loan Agreement", which agreement I refer to herein below.

[6] The applicants have attached an affidavit of Stephen Raymond Robinson who states that he is a Chartered Accountant (SA) and a Chartered Financial Analyst and holds a post-graduate diploma in Company Law, Income Tax and International Tax. Robinson states in his affidavit that he has undertaken a forensic investigation into the affairs of HWM after its liquidation on 30 October 2007.

[7] The essence of the affidavits of Botha and Robinson is that the original share holders of WHM sold their shares when their loan account stood at R38 million. The only share holder after the aforesaid sale of shares was Cheg Trading 142 (Pty) Ltd. Cornelius (Cottie) Kirsten and Ronald Allan Wiggil were appointed directors of Cheg Trading 142 (which I shall henceforth refer to as CT 142.) respectively on 8 September

2004 and 1 June 2006. Kirsten and Wiggil were also directors of HWM.[1]

[8] According to Botha, Kirsten who is an attorney of this Court was one of the key figures in the business affairs and financial management of HWM and acted as a *de facto* managing director.

[9] During and about 2005 one Phillip Owen Lawrenson, a supposedly professional business rescuer joined the management of WHM. Notwithstanding the presence of Lawrenson and various cash injections WHM traded at a financial loss running into several millions, R5 million during 2005, R12 million during 2006 and R19 million during 2007 and R7.6 million from 1 March 2007 to September 2007.

[10] It is alleged that the losses suffered by WHM was as the result of the inability of Kirsten, Wiggil and Lawrenson to manage the financial affairs of WHM, and that the three traded recklessly

[1] Vide DMB4 at paginated page 49-57 which is CIPRO report.

and continued to incur debt without any prospect of WHM being in a position to repay its incurred debts. This eventuated in Boldprops, as a director relying on a claim of R288 909. 52 WHM failed to pay notwithstanding a demand in terms of section 345(1)[2] of the Companies Act 61 of 1973.

[11] The relevant application for the liquidation of WHM was issued on 4 October 2007 under case number 23559/07. The application was brought by Boldprayers on the grounds that it has supplied HWM with steel products for which HWM failed to pay. The application was issued on 4 October 2007 and was not opposed. On 30 October 2007 WHM was placed in provisional liquidation. The applicants were appointed as joint provisional liquidators of WHM on 18 January 2008. On 18 April

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[2] S345(1) A company or body corporate shall be deemed to be unable to pay its debts if—

(a) if a creditor, by cession or otherwise, to whom the company is indebted in a sum not less than one hundred rand then due—

(i) has served on the company, by leaving the same at its registered office, a demand requiring the company to pay the sum so due; or

(ii) in the case of any body corporate not incorporated under this Act, has served such demand by leaving it at its main office or delivering it to the secretary or some director, manager, or principal officer of such body corporate or in such other manner as the Court may direct

and the company or body corporate has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor;

(b) ...

(c) It is proved to the satisfaction of the Court that the company is unable to its debt.

2008 both applicants were nominated as and elected by creditors as the final liquidators.

[12] According to Botha Kirsten, Wiggil and Lawrenson continued to conduct the business of HWM despite of its factual and commercial insolvency, after its liquidation on 4 October 2007 whilst they were aware of its insolvent status[3]. Kirsten was one of the two directors of HWM on 4 October 2007 and Wiggil was the other director.

[13] Kirsten and Wiggil were also directors of CT 142, which was the sole share holder of HWM. Kirsten established CKLK Trust of which he is a trustee. According to Botha, Kirsten at all relevant times was effectively in control of the affairs of CKLK Trust[4], which is the shareholder in various companies relevant to the affairs of WHM. Annexure DM10 is a diagram that reveals various family trusts that in one way or another relate to HWM.

[3] Vide paginated pages 20 and 21 paragraphs 8.2-8.3.

[4] Attached to the papers is annexure DMB 10 at paginated page 102 in both these case.

[14] Lottering Family Trust, is the family trust of Ian Lottering, a co-director with Kirsten of KLS Attorneys, which attorneys held in trust moneys of HWM. CKLK Trust and Lottering Family Trust own all the shares in Cheg Trading 155 (Pty) Ltd. Cheg Trading 155 in turn holds 40% shareholding in Malokiba Trading 44, which owns 50% of the shares in Cheg Trading 142, which is the sole shareholder of HWM. Kirsten is the director of Trading 155. Cheg Trading 155 is a 70% shareholder in Malokiba Trading 35 (Pty) Ltd, which in turn is a shareholder in Malokiba Trading 19 (Pty) Ltd. Kirsten, is the director of Malokiba Trading 35.

[15] It is further averred by Botha that Malokiba Trading 19 was a company which ostensibly conducted business as a bridging company, but in fact was a pyramid scheme. The only director of Malokiba 19 was Ms Susan Kretzmann. Kirsten was actively involved in the management of Malokiba Trading 19 and KLS Attorneys acted as the "promoter, banker and administrator" of Malokiba Trading 19. KLS Attorneys were in fact the

paymaster of Malokiba Trading 19 through which company they operated a pyramid scheme.

[16] Botha has further averred that Kirsten was not only involved in Trading 19, but had access to the funds of Malokiba 19, as all monies received by Malokiba Trading 19, were received in the trust account of KLS Attorneys, where he was a director. He further avers that Kirsten transferred various amounts to WHM from the funds of Malokiba Trading 19, held in the trust account of KLS Attorneys. Such transfer of funds was not authorised by and was in breach of the mandate given by investors to Malokiba Trading 19, namely that such funds should be used to finance bridging transactions where required.

[17] It is further averred that no legal cause for the payment of funds from Malokiba Trading 19 to Cheg Trading 142, or HWM existed. There are no documents found substantiating or legally justifying whatever payment made by Kirsten or KLS

Attorneys[5]. Robinson further avers, inter alia, that Lawrenson and Lotterong, Kirstenand Lawrenson on behalf of HWM entered into an agreement of sale of the assets of HWM with Friedshelf 635 (Pty) Ltd and Aisha 2 Ou Bottling (Pty) Ltd. The purported sale of the fixed assets of HWM was effected by defrauding the purchasers of the assets by not disclosing to the purchasers that the company was in final liquidation, nor disclosing the company's indebtedness to Malokiba Trading 19.

[18] It is further averred, inter alia, that Friedshelf 635 paid to HWM an amount of R5.6 million during November 2007. During such payment, Friedshelf itself had been placed under winding-up. Obviously, such payment was after HWM was placed in liquidation. There is pending case under case number 56554/08 to determine the status of this amount.

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[5] Vide paginated page 125 affidavit of Robinson paragraph 30.3. where he states that he "could find no documenatation indicating an underlying contractual relationship between the various parties supporting, for example, payments made by Malokiba Trading 19, by way of journal, to B229 and payments from B229, to HWM and or behalf of WHM and Cheg Trading 142 9Pyt) Ltd or other related entities by way of further journal and or cheque payments or vouchers (debit and credit."

[19] A further reading of the papers reveals a disconcerting allegations concerning, what I perceive as malpractice in trust accounts and with trust amounts by the firm of KLS Attorneys[6]. Robinson avers, *inter alia*, that Kirsten used trust account of KLS for his personal financial affairs, paid his personal creditors, doctors, suppliers of building material, his wife and received large amounts of money in this trust account[7]. There

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[6] Vide Rule 69.5 of the Rules of the Law Society which provides that a firm shall ensure that withdrawals from its trust banking account as transfers to its business account shall be made in respect of money claimed to be due to the firm and only in terms of Rule 69.6 when a fee of disbursement has been correctly debited in its records.

[7] Vide Law Society of The Cape of Good Hope v Tobias and Another 1991 (1) SA 430 (CPD) at 442F-I where the honourable Behrman J said that:

"The duty of an attorney in relation to moneys received by him in trust has been stated and re-stated over the years, most recently by Kirk-Cohen J in Matthews ' case supra at 394B - E in the following passage, viz:

'Section 78(1) of the Attorneys Act obliges an attorney to maintain a separate trust account and to deposit therein money held or received by him on account of any person. Where trust money is paid to an attorney it is his duty to keep in his possession and to use it for no other G purpose than that of the trust. It is inherent in such a trust that the attorney should at all times have available liquid funds in an equivalent amount. The very essence of a trust is the absence of risk. It is imperative that trust money in the possession of an attorney should be available to his client the instant it becomes payable. Trust money is generally payable before and not after demand. See Incorporated Law Society, Transvaal v Visse and Others ; Incorporated Law Society, H Transvaal v Viljoen 1958 (4) SA 115 (T) at 118F - H. An attorney's duty in regard to the preservation of trust money is a fundamental, positive and unqualified duty. Thus neither are further serious allegations made concerning the use of trust moneys held in the KLS Attorneys. I find myself compelled to bring to the attention of the Law Society of Northern Provinces of Transvaal these allegations, if these have not by now come to its attention, so that a proper investigation be conducted by them and take appropriate steps, if the circumstances so warrant.

[20] for purposes of this matter, I find it not necessary to chronicle all the averments contained in the affidavits of Botha and Robinson. I shall however refer to what is essential for the purposes of the adjudication of this matter.

[21] At paginated pages 222 and 223 is attached a copy statement of an ABSA cheque account number 40-6869-845 in the name

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negligence nor wilfulness is an element of breach of such duty; Incorporated Law Society, Transvaal v Behrman 1977 (1) SA 904 (T) at 905H. It is significant that in terms of s 83(13) of the Attorneys Act a practitioner who contravenes the provisions relating to his trust account and investment of trust money will be guilty of unprofessional conduct and be liable to be struck off the roll or suspended from practice.'

of HWM, as annexure SRR2 to the affidavit of Robinson. This statement reflects that on 17 November 2007 an electronic payment to Card No 6928 Mineral-loy in the amount of R37548.18 was made.

[22] At paginated page 223 is attached a copy of statement of an ABSA cheque account number 40-6869-845 in the name of HWM, as annexure SRR2 to the affidavit of Robinson. This statement reflects that on 22 November 2007 an electronic payment in the amount of R56844. 50 to Jofider was made. On paginated page 220, on 30 November 2007 a debit transfer in the amount of R56475. 14 was made to Jofider.

[23] There is attached to the papers, a copy of an agreement titled Sale and Loan Agreement between Fried Shelf 635 (Pty) Ltd, Cheg Trading 142 (Pty) Ltd (CT142) and various other entities, as well as HWM attached as annexure DMB 16.which states, *inter alia*, that:

"CT142 is the owner of the total issued share capital in HWM consisting of (a) 1000 (one thousand) shares at par value thereof R1. 00 (one rand);

(b) 1 (one) share at par value thereof of R1.00 (one rand issued at 12 0000 of R12 0000. 00

[24] The agreement further provides under Loan Accounts that WHM is indebted to CT142 in respect of the loan account in the amount of R59 654 337.

[25] The aforesaid agreement was signed on 23 November 2007. I must hasten to state that it was signed after the *concursus creditoris* in respect of WHM has manifested. I am made to understand that in respect of the status of this contract and the consequential performance by the respective parties under it, there is an opposed pending matter before this court, and which is set to be heard before the end of this year. I shall therefore refrain saying much about this contract.

[26] Section 341 of the Companies Act 61 of 1973 provides that:

"(1) Every transfer of shares of a company being wound-up or alteration in status of its members affected after the commencement of the winding-up without the sanction of the liquidator, shall be void.

(2) Every disposition of its property (including rights of action) by any company being wound-up and unable to pay its debts made after commencement of the winding-up, shall be void unless the Court otherwise orders."

[27] The payment of the amount R37 548.18 to Mineral-loy, the amounts of R56 844. 50 and R56 475.14 were all made during November 2007 after the *concursus creditorus* had already commenced. WHM was placed under provisional liquidation on 4 October 2007 after Boldprayers had averred that WHM is unable to pay its debts. The relevant application was not contested by WHM. I therefore, for purposes of section 341(2) of the Companies Act, accept that WHM was unable to pay its debts at the time when it was placed under provisional

liquidation. After the 4 October 2007 the estate of WHM vested in the hands of the Master, and after the appointment of the provisional liquidators, in the hands of the latter. No other person either than the Master during November 2007 had authority to dispose of the assets of the WHM (in liquidation.).Any payment effected from the account of WHM during November 2007, was consequently void and I find as such.

[28] In the light of the above findings, I am of the view that the applicants are entitled to reclaim the above mentioned payments. In the result I find it not necessary to decide the alternatives of the claim in terms of either section 26 or section 29 and or 30 of the Insolvency Act.

[29] With regard to the costs, it is so that the costs follow the event. I, however, find it necessary comment about the prolixity of the documents in both matters. Matter under case number 35949/ 07 consist of at least 220 paginated papers. Matter under case number 35953/ 2007 consists of at least 223 paginated pages.

In fact, the averments in both matters are identical, if the papers are not a mere duplication.

[30] The applicants have gone to a great length in placing the genesis of the HWM, from its inception to its financial woes eventuating in it being placed under provisional winding-up. They have also placed as annexure DMB11 which is a copy of the application of the pending matter I have referred to in herein above. In my view, the applicants have been more than it is necessary over elaborate. What was of essence for purposes of this application was the fact that HWM was placed under provisional winding-up on 4 October 2007 and that the applicants were appointed joint provisional and final liquidators and that payment were effected from the account of WHM after *concursus creditoris* had set in. Had the matters been singularly focused in placing only what was necessary to justify the orders sought, the papers would have been substantially less than what they are.

[31] In my view, where an applicant has been over elaborate, as is the case in both matters, where as he could have obtain the relief sought without necessarily having been over elaborate, he should not be entitled to all the fees, especially those fees that relate to the work they could have done without to obtain the order sought.

[32] I am of the view, that the respondents should not be burdened by the overzealousness of the applicants in bring every piece of evidence which could have been left out. Prolixity should not be countenanced. I am of the view that, this application should have consisted of not more that 80 pages. I am of the view that the applicants are only entitled to charge fees that would not exceed the preparation of work of 80 pages, and not that is in excess of such pages.

[33] In the result I make the following orders:

(A) <u>**Under case number 35949/2009:**</u>

1. **That the payment of R16 526. 58 on 17 November 2007 and R13 699.38 on 28 November 2007 to the Respondent is declared to be a disposition of the property of Hua Wei Manufacturing (Pty) Ltd (in liquidation) , after commencement of the winding-up in terms of the provisions of section 341(2) of the Companies Act 61 of 1973.**
2. **That judgment is granted against the Respondent for the payment of the amount of R30 225. 96.**
3. **That the Respondent is ordered to pay interest on the amount of R16 526. 58 at rate of 15.5% per annum from 17 November 2007 and on the amount of R13 699.38 at rate of 15.5% per annum from 28 November 2008 to date of payment.**
4. **Costs of suit, which cost shall not exceed work done for not more than 80 pages.**

(B) <u>**AD CASE number 35953/ 09**</u>

1. **That the payment of R56 475. 14 on 30 November 2007 to the Respondent is declared to be a disposition of the property of Hua Wei Manufacturing (Pty) Ltd (in liquidation), after**

commencement of the winding-up in terms of the provisions of section 341(2) of the Companies Act 61 of 1973.

2. That judgment is granted against the Respondent for the payment of the amount of R56 475. 14.

3 That the Respondent is ordered to pay interest on the amount of R56 475. 14 at rate of 15.5% per annum a temporae morae from 30 November 2007 to date of payment.

4 Costs of suit, which cost shall not exceed work done for not more than 80 pages.

(C) The registrar of this Court is directed to immediately forward copies of this judgment as well as of both applications *in casu* to the Chairperson of the Law Societies of Northern Provinces, who must decide whether or not there is any cause to investigate the trust accounts and records of the firm KLS Attorneys referred to in these documents, and if need be, to take appropriate steps against such firm.

N.M. MAVUNDLA
JUDGE OF THE HIGH COURT

HEARD ON THE : 03 / 08/2009
DATE OF JUDGMENT: 04 /08/ 2009
APPICANT`S ATT : STRYDOM & BREDENKAMP
APPLICANT`S ADV : MS HANLIE VERMAAK.