

SOUTH AFRICA / JUDGMENT

Giwhala NO and Another v Spies (3350/2008) [2009] ZAWCHC 111 (4 February 2009) [2009] ZAWCHC 111

COURT

Western Cape High Court, Cape Town

BEFORE

Eloff

CASE / FILE NUMBER

3350/2008

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JUDGMENT

IN THE HIGH COURT OF SOUTH AFRICA(WESTERN CAPE HIGH COURT. CAPE TOWN)CASE NO:
3350/2008

DATE: 4 FEBRUARY 2009

In the matter between:

PtNES CHANDRA MANILAL GIHWALA NO. 1st PLAINTIFF

GEORGE NICHOLAS PAPADAKIS NO. 2nd PLAINTIFF

and

LODEWYK PETRUS SPIES RESPONDENT

ELOFF, AJ:

On 1 February 2007, this Court, at the instance of the Executive Officer of the Financial Services Board ("the FSB") issued an order in terms whereof the whole of the business of providing financial services as contemplated by the Financial Advisory and Intermediary Services Act, No 37 of 2002, of inter alia Fidentia Holdings (Pty) Limited with registration number 2001/022355/07 (formerly known as Brown Brothers Holdings (Pty) Limited, and not to be confused with a company bearing the same name, but with registration number 1999/026724/07) was placed provisionally under curatorship in accordance with the provisions of Section 5 of the Financial Institutions (Protection of Funds) Act, No 28 of 2001. I shall hereafter refer to this order as "the provisional order".

In terms of paragraph 2 of the provisional order, the first and second plaintiffs in this action were appointed as curators of the business of, inter alia, Fidentia Holdings. Further relevant paragraphs of the provisional order were the following;

1] In terms of paragraph 5.1 thereof, the curators were, pending the return date of the provision order, authorised to take immediate

control of, to manage and to investigate the business and operations of and concerning the companies which include Fidentia Holdings (Pty) Limited, together with all their assets and interests.

2] In terms of paragraph 5.2 thereof, the curators were vested with all executive powers which would ordinarily be vested in and exercised by the Board of Directors or members of the companies,

3] In terms of paragraph 5.3 of the provisional order, the curators were directed to give consideration to the best interests of the investors in the companies who had entrusted monies to the companies or whose monies had been invested with the companies or were being managed or administered by/or on instruction of the companies.

4] In terms of paragraph 5.8 of the provisional order, the curators were authorised to incur such reasonable expenses and costs as would be necessary or expedient for the curatorship in control of the business and operations of the companies, and to pay same from the assets held, administered or under the control of the companies.

5] In terms of paragraph 5.9 of the order, the curators were permitted to engage such assistance of a legal, accounting, administrative, or other professional or technical nature, as they might reasonably deem necessary for the performance of their duties in terms of the provisional order, and to defray reasonable charges and expenses thus incurred from the assets held or under control of the companies.

6] In terms of paragraph 5.10 of the provisional order, the curators were authorised to institute or prosecute any legal proceedings on behalf of the companies and to defend any litigation against the companies.

7] In terms of paragraph 9 of the provisional order, the curators would be remunerated in accordance with the norms of the Attorneys and Auditors profession respectively, as agreed with the Registrar, such remuneration to be paid from the assets of, held by or under the control of the companies on a preferential basis.

On 12 April 2007 this Court confirmed the provisional order, subject to some changes. In paragraph 4 of the final order, it was provided that the curators would file a further report to the Court by not later than 16 November 2007 dealing with, inter alia, details of civil actions which might have been instituted by or against the curators.

Subsequent to the commencement of the curatorship status, the two plaintiffs in this action instituted various sets of proceedings, including sequestration applications against various persons. In such proceedings, the curators appointed a firm of attorneys previously

known as Hofmeyr, Herbstein, Gihwala and, subsequent to a recent merger, now known as Cliffe Dekker Hofmeyer Inc. It is common cause that the first plaintiff is the Chairman of this firm.

The fact that the curators appointed that firm to act in the said litigious proceedings, has, in consequence of the first plaintiff's

chairmanship thereof, drawn adverse criticism from inter alia Desai, J in a judgment delivered by him in about June 2008, in a matter known as S Moodliar N.O and M A Mohamed N.O. v M A Oetlev N.O. and JAW Brown N.O. and M A Oetlev and Dykes van Heerden. The relief which he granted, was to make a settlement agreement an order of Court. I have been given to understand that Desai, J expressed himself inter alia as follows;

"I have been in Motion Court for the past two days, and I haven't been in Motion Court for some time, and I have seen at least three matters involving Brown where Hofmeyers are the attorneys dealing with those ... They are dealing for those whose monies are involved, workers whose monies are involved and litigation is exhausting these funds. Shouldn't the litigation be conducted at arm's length ... and conducted with the curator keeping an eye on the litigator. In this case, Mr Gihwala is the Chairman of Hofmeyers, the curator and litigator are one and the same ... The curator is appointed in the public interest for an interest that is public he is to keep an eye to make sure that nothing gets out of hand. How can he supervise litigation if he benefits from the litigation, that is my point."

The plaintiffs have, in their capacities as curators of Fidentia Holdings, instituted the current action which now serves before me, again employing the services of Cliffe Dekker Hofmeyer Incorporated. That, submits the defendant, is "illegal" because of the conflict of interest facing the first plaintiff who, as Mr Donen, SC, for the defendant, graphically illustrates, finds himself wearing two conflicting hats at the same time, one as curator, and the other as Chairman of the firm of attorneys employed by him to institute and conduct this action.

Having heard full argument from the plaintiffs and the defendant, I am required to decide whether, having regard to what Mr Donen described as the unlawful conduct of the first plaintiff, with which he submits the second plaintiff associates himself, I should strike the matter from the roll so as, presumably, to enable the plaintiffs to appoint another firm to act on their behalf in this litigation. An order striking the trial from the roll is what Mr Donen suggests is the appropriate order. It will, obviously, if granted, be purely of a dilatory nature.

The defendant has also raised a point of non-joinder of Brown Brothers Holdings, but the withdrawal by the plaintiffs of their third claim in the action has effectively stripped this point of its substance, assuming that it had any validity.

I need to digress for a moment to consider whether the defendant has adopted the correct procedure in raising the points regarding Mr Gihwalas suggested conflict of interest before me. Mr Donen contends that it is merely a legal issue without any factual content. Her nonetheless, very properly, drew my attention to Section 5 (8)(d) of the Financial Institutions Act, which reads as follows;

"Any person, on good cause shown, may make application to the Court to set aside or alter any decision made, or action taken, by the curator, or the registrar, with regard to any matter arising out of, or in connection with, the control and management of the business or of an institution which has been placed under curatorship."

Mr Donen contends that this section does not apply in the instant case, and that it was not been designed to cater for the type of application

currently before me. I disagree. The curators derived their power to institute this action and to appoint attorneys to do so from the provisional order. Such powers do not have their origin in any statute of Parliament. The consequence of the defendant's election to base its entire application before me on legal argument, is that any factual material that may require consideration and that may constitute an important aspect of the issue to be considered, has not been traversed, and will therefore remain a matter of speculation.

The substance of the defendant's argument is encapsulated in paragraph 1.3 of his further particulars for trial, reading as follows:

"Insofar as plaintiffs participate in these proceedings as statutory curators the plaintiffs are precluded from being represented by their attorneys of record because first plaintiff is the Chairperson of Hofmeyer, Herbsfein and Gihwala Inc."

In paragraph 3.1(d) of the defendant's heads of argument, Mr Donen described the substance of the defendant's legal point as follows;

"The substance of the objection is that as a matter of law (not simply ethics) plaintiffs may not proceed while the first joint curator has an interest in profiting in his personal capacity from this litigation. To do so would be illegal."

Mr Donen contended in argument that whether or not the first plaintiff stands to share in the profits to be earned by Cliffe Dekker Hofmeyer Inc from the conduct of this litigation, and regardless of any disclosures that may or may not have been made by the first plaintiff

to the FSB or to the Registrar or the Court in regard to the position occupied by him as Chairman of Cliffe Dekker Hofmeyr Inc, the appointment by the first plaintiff of Cliffe Dekker Hofmeyr Inc as attorneys to act in this action is "illegal", because the first plaintiff lacked any power to make such appointment. Put differently, so Mr Donen contended, the plaintiffs were empowered to appoint attorneys in relation to this action, but that the first plaintiff's own firm

could not be so appointed, because of the inevitable conflict of interest that would arise.

I accept for purposes hereof that the appointment by the first plaintiff of Cliffe Dekker Hofmeyer Inc En circumstances where he

stands to share in the profits that may be earned from the conduct of this litigation, and without declaring his interests to the FSB the registrar of the Court, will place him in a conflict situation, which he was and is duty bound to avoid.

Two questions arise for determination;

- [1] Is Mr Gihwala to share in the profits that may arise from the conduct of this action, and has he made any disclosure thereof;
- [2] What is the legal consequence if Mr Gihwala stands to share in the profits to be earned by Cliffe Dekker Hofmeyer from this litigation in circumstances where he made no disclosure of his position.

in regard to the first question, no facts have been placed before me that might enable me to draw any conclusion, one way or the other. In fact, during argument, Mr Daniels, on behalf of the plaintiffs, drew attention to certain documents from which it appeared that the necessary disclosures may very well have been made. These issues were, however, not traversed on a factual basis, Mr Donen having chosen to present his case purely on a legal basis. Moreover, it is certainly not impossible to assume that Mr Gihwala may not share in any of the profits that may be derived from the conduct of this action by the firm of which he is Chairman, and that he has made the necessary disclosures. But, says Mr Donen, all of this is irrelevant, because Mr Gihwala placed himself in a conflict situation in breach of his duties as curator by appointing

Cliffe Dekker Hofmeyer Inc to act as attorneys in this action, and that such appointment is therefore illegal and void.

In support of his argument, Mr Donen relied on, inter alia, the passage to be found in *Oudekraal Estates (Pty) Limited v City of Cape Town and Others* 2004(6) SA 222 (SCA) at 345-6 para [35]. I do not find support for Mr Donen's approach in the passage in *Oudekraal's* case relied upon by him. He also relied on the following passage which appears in the judgment of Schreiner, J in *Mustapha and Another v Receiver of Revenue Lichtenburq* 1958(3) SA 343 (AD) at 347 e-g:

"The powers of fixing the terms of the permit and of acting under those terms are all statutory powers. In exercising the power to grant or renew, or to refuse to grant or renew, the permit, the Minister acts as a State official and not as a private owner, who need listen to no representations and is entitled to act as arbitrarily as he pleases, so long as he breaks no contract. For no reason or the worst of reasons the private owner can exclude whom he wills from his property and eject anyone to whom he has given merely precarious permission to be there. But the Minister has no such free hand. He receives his powers directly or indirectly from the Statute alone and can only act within its limitations, express or implied. If the exercise of his powers under the sub-section is challenged, the Courts must interpret the provision including its implications and any lawfully made regulations, in order to decide whether the powers have been lawfully exercised."

I do not believe that this passage supports Mr Donen's contentions, I am, in any event, not convinced that the first plaintiff acted beyond his powers in appointing Cliffe Dekker Hofmeyer Inc to act as the plaintiffs' attorneys in this action, a matter to which I shall revert shortly.

Mr Donen submitted that since, in appointing Cliffe Dekker Hofmeyer Inc to act as attorneys in this action, the plaintiffs purported to exercise a power with which they had not been clothed, such appointment was ultra vires their powers, and hence void. He branded this a constitutional issue.

As has been pointed out, the origin of the curators' power to appoint attorneys to conduct litigation on their behalf, is to be found in the paragraphs of the provisional order quoted earlier herein.

Paragraph 5.9 of the provisional order is not prescriptive as to which firms of attorneys may be appointed. It goes without saying that in selecting the appropriate firm to act for the curators should, in accordance with their common law duties, which are akin to those of a trustee, avoid a situation where a conflict of interest can arise. Although I constat, however, that where their selection may result in a conflict of interest, the curators acted without any power to do so. What, then, is the legal consequence of the first plaintiff's selection and appointment of a firm of attorneys which may result in a conflict coming about? I have not been referred to any authority which supported the defendant's solution, being the invalidity of appointment, nor has my own research yielded such an answer. In my view, Honored South African Law of Trusts, 5th Edition by Cameron and others provides the correct answer in paragraph 223 on pages 355 to 357:

"The acts of a trustee who is also a beneficiary and acts so as to benefit himself or herself at the expense of other beneficiaries,

will be narrowly scrutinised and are unlikely to be confirmed by the Court. A trustee, even though innocent, whose position involves a conflict of interest and duty may be removed from office by the Court. Many of the cases cited above concern executors, agents and other persons who are not trustees in a strict sense. This is because the 'no profit' principle extends to all those in fiduciary positions, to trustees of all kinds - executors, trustees of estates, solicitors, confidential agents. In general 'no transaction where interest and duty conflict should be recognised or countenanced by the law'. Legal transactions that contravene this principle are in general voidable, not void. This is true even of a sale or loan by trustees to themselves in a private capacity, for the trust estate is separate from the trustee's private estate. Similarly a sale

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through an intermediary, while not void, will be carefully scrutinised in view of its surreptitious character. The same is true of the purchase by a trustee of trust property, with the concurrence of the other trustees, though in general a co-owner may validly purchase the shares of fellow owners. A sale by a trustee to a juristic person of which he or she is an officer or director is not automatically void". Whether such voidable transactions will be set aside by the Court depends on the circumstances and, in particular, on whether the transaction is entered into openly and in good faith. If the beneficiaries and potential beneficiaries who are of full capacity have consented to it with full knowledge of the circumstances, or the trustee can be said to have acted as a stranger to the estate" in concluding the transaction, it will be upheld. The same is true if a transaction is genuinely in the interest of beneficiaries." Was the appointment of Cliffe Dekker Hofmeyer Inc to act in the conduct of the current action prejudicial to the interests of investors and other interested parties? Without conducting a full investigation, one cannot say. It is therefore not possible to predict whether a Court faced with all the relevant circumstances will set the appointment aside. I am certainly not in a position to do so, and there is no substantive application before me to do so. As I have pointed out earlier, the relief sought by the defendant is that the trial be struck from the roll. I do not believe that the argument of the defendant justifies such an approach; but even if I had concluded that the appointment of Cliffe Dekker Hofmeyer Inc to act as the plaintiffs' attorneys in this action was to be set aside, it is not inconceivable that another firm will, with the retention of the services of the same counsel, be able to substitute Cliffe Dekker Hofmeyr Inc as the plaintiffs' attorneys of record, without losing any substantial momentum in the conduct of the trial. The result is that the DEFENDANT'S APPLICATION THAT THE TRIAL IN THIS ACTION BE STRUCK FROM THE ROLL IS REFUSED WITH COSTS. It is common cause that this application consumed the entire days of 2 and 3 February 2009. ELOFF, AJ

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Was the appointment of Cliffe Dekker Hofmeyer Inc to act in the conduct of the current action prejudicial to the interests of investors and other interested parties? Without conducting a full investigation, one cannot say. It is therefore not possible to predict whether a Court faced with all the relevant circumstances will set the appointment aside. I am certainfy not in a position to do so, and there is no substantive application before me to do so.

As I have pointed out earlier, the relief sought by the defendant is that the trial be struck from the roll. I do not believe that the argument of the defendant justifies such an approach; but even if I had concluded that the appointment of Cliffe Dekker Hofmeyer Inc to act as the plaintiffs' attorneys in this action was to be set aside, it is not inconceivable that another firm will, with the retention of the services of the same counsel, be able to substitute Cliffe Dekker Hofmeyr Inc as the plaintiffs¹ attorneys of record, without losing any substantial momentum in the conduct of the trial.

The result is that the DEFENDANT'S APPLICATION THAT THE TRIAL IN THIS ACTION BE STRUCK FROM THE ROLL IS REFUSED WITH COSTS. It is common cause that this application consumed the entire days of 2 and 3 February 2009.

ELOFF, AJ

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