

SOUTH AFRICA / JUDGMENT

Laniyan v Negota SSH (Gauteng) Incorporated and Others (09/35083) [2013] ZAGPJHC 128; [2013] 2 All SA 309 (GSJ) (20 February 2013)

[2013] ZAGPJHC 128

COURT

South Gauteng High Court, Johannesburg

BEFORE

S Weiner

CASE / FILE NUMBER

09/35083

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REPORTABLE

SOUTH

GAUTENG HIGH COURT JOHANNESBURG

CASE

NO: 09/35083

DATE:20/02/2013

In

the matter between:

LANIYAN
BABATUNDE
OLA.....Applicant
and
NEGOTA
SSH (GAUTENG)
INCORPORATED.....First
Respondent
MINNAAR.
JOHANNES
GERHARDUS.....Second
Respondent
STEPHANUS
NEGOTA.
GEORGE
MAANDA.....Third
Respondent
PIENAAR.
DEON.....Fourth
Respondent
MATHEKGA.

SERUMULA
STANLEY.....Fifth
Respondent

JUDGMENT

Background

[1] The applicant purchased an immovable property namely; Portion 1 and Portion 2 of ERF 1727 Houghton Estate Township, Registration Division I.R. in the Province of Gauteng, in terms of a written sale agreement (“the agreement”). The first respondent was appointed as “the seller’s attorneys”. The applicant deposited the full purchase consideration into the first respondent’s trust account pursuant to the conclusion of the agreement.

[2] It is common cause that the fourth respondent (Pienaar) misappropriated the balance of the money deposited in the sum of R14

026 066.40. The first respondent ceased trading during May 2012. Pienaar has been struck from the roll of attorneys and absconded

before the application could be served upon him. A curator bonis has been appointed in respect of the first respondent’s bank accounts, on the application of the Law Society of the Northern Provinces.

[3] The applicant applies for the final liquidation of the first respondent and an order against the second, third and fifth respondents (hereinafter referred to as “the respondents”), jointly plus interest and costs. At the hearing, counsel for the Respondents informed the court that the application for winding-up the first respondent would not be opposed.

[4] The applicant’s relief against the respondents personally in terms of section 53(b) of the Companies Act read with section 23(1)(a) of the Attorneys Act, 53 of 1979.

Issues

[5] . The remaining issues are:

5.1 whether the respondents are personally liable for the debts of the first respondent in terms of section 53 (b) of the Companies Act, read with, section 23(1)(a) of the Attorneys Act, 53 of 1979

5.2 whether this application is the appropriate remedy or whether the applicant’s remedy lies against the seller of the property. The seller, Salient CC, was placed into liquidation on 25 May 2012.

[6] The essential question is whether there was a contractual relationship between the applicant and the seller’s attorneys,

i.e. was the first respondent acting as agent for both the applicant and the seller in dealing with the transaction? Clause 5 of the agreement provides;

"5.1 The Purchaser shall pay on signature hereof a deposit in the amount of R13 815 643-00 (THIRTEEN MILLION EIGHT HUNDRED AND FIFTEEN THOUSAND AND SIX HUNDRED AND FORTY THREE RANDS) to the seller's attorneys which shall be invested in terms of section 18(2A) of the Attorneys Act 1979 which interest shall accrue for the benefit of the Purchaser until transfer. An amount of R1 615 643-00 (One Million Six Hundred and Fifteen Thousand and Six Hundred and Forty Three Rands) may be released from this deposit immediately and made payable to the Builder/Seller/Agent for work to be carried out for all extras as per agreement of Purchaser/Owner which Purchaser/Owner does hereby authorise the attorneys to release this amount Immediately after registration of transfer of the Property into the name of the Purchaser, the Seller's Attorney must pay:

5.2. to the Seller the money referred to in clause 5.1 above, less the balance of commission due to the Estate Agent in terms of clause 7; and

5.3 to the purchaser all interest which has accrued on such payment. [Emphasis added]

[7] The first issue is whether the applicant is a creditor of the first respondent; secondly, whether that relationship is contractual.

Without that relationship, no action would lie against the respondents, in terms of the relevant sections of the Companies Act

and the Attorneys Act.

[8] The respondents admit that:

8.1 the applicant paid R 14 million into the first respondent's trust account to be invested in an interest bearing account, the interest to accrue for the benefit of the Applicant; and

' 8.2 that money was stolen by the partner (Pienaar) who dealt with the property transaction on behalf of the firm.

[9] The Applicant submits that in terms of clause 5.1. of the agreement, the applicant granted the first respondent a mandate to invest the applicant's money in terms of section 78(2A) of the Attorneys Act, which interest would accrue for the benefit of the applicant This mandate, according to the Applicant establishes the contractual relationship. In this regard, the applicant relies upon *Basson v Remini and Another*¹ in which Magid J held that:-

"In evidence, Mr Shelwell admitted, quite correctly in my view, that by accepting the appointment as conveyancer in respect of the

transaction between the applicant and the first respondent, the second respondent became the agent of both parties. Moreover; it is plain that in agreeing to receive the money and hold it in trust Shelwell was agreeing to act as agent of the applicant in relation to that money.[emphasis added].... His authority in relation thereto [the agreement between the applicant and the first respondent/

depended on the terms of his contract with the applicant. That contract was one of agency. ...”

[10] Applicant also relied upon Fundstrust (Pty) Ltd (In Liquidation) v Van Deventer² in which Hefer JA held at Page 734:

“Since there is a contractual relationship between a stockbroker and his client, requiring honesty and reasonable care, any loss which the latter might suffer as a result of his broker's fraudulent or negligent conduct, would be recoverable by way of a contractual

action and the directors would be liable under section 6A (or its successors)”.

[10] It appears clear that the first respondent was the applicant's agent, based upon the mandate to invest his money and then pay same out. Upon this basis, the nature of the applicant's claim against the first respondent is based in contract and the applicant is a creditor of the first respondent.

Personal liability of the respondents

[11] It is common cause that the first respondent was incorporated in terms of section 53(b) of the Companies Act.

[12] Section 23(1)(a) of the Attorneys Act 53 of 1979 provides that-

[13] 23(1) A private company may notwithstanding anything to the contrary contained in this Act, conduct a practice if-

(a) such company is incorporated and registered as a private company under the Companies Act; 1973 (Act 61 of 1973), with a share capital, and its memorandum of association provides that all present and past directors of the company shall be liable jointly and severally with the company for the debts and liabilities of the company contracted during their periods of office:[Emphasis added]

[14] Section 53(b) of the Companies Act provides that:-

a(the) memorandum of a company may, in addition to the requirements of s 52 -

(a)

(a) in the case of a private company, provide that the directors and past directors shall be liable jointly and severally, together with the company, for such debts and liabilities of the company as are or were contracted during their periods of office. in which case the said directors and past directors shall be so liable. ” [Emphasis added]

[15] Section 19(3) of the Companies Act, Act 71 of 2008 similarly provides that:-

“(3) If a company is a personal liability company the directors and past directors are jointly and severally liable, together with the company, for any debts and liabilities of the company as are or were contracted during their respective periods of office..”

[Emphasis added]

[16] The respondents contend that their personal liability for the debts of the first respondent is limited to debts “contracted”

during their periods of office. They submit that the applicant’s claim against the first respondent is not based in contract and therefore no personal liability arises. I have already dealt with this submission above in relation to the Applicant's mandate to the First Respondent.

[17] The meaning of this provision was dealt with in Fundtrust³. Hefer JA held that the word “contracted” refers only to contractual debts and liabilities of a company. The learned Judge held in Fundtrust that this limited interpretation of the word “contracted” will not lead to the anomalous result that directors would be liable for a contractual debt owed to the company’s creditors but not for monies stolen from such

creditors.⁴ The Fundtrust case concerned the relationship between a stockbroker and an investor. The court held that the investor is entitled to recover “...any loss which the latter might suffer as a result

of his broker’s fraudulent or negligent conduct, by way of a contractual action and the directors would be liable”.⁵

[18] In Fundtrust⁶ Hefer JA dealt with Section 6A of the Companies Amendment, 62 of 1968, the precursor to section 53 (b) of the Companies Act: "It

is clear that Parliament intended to impose on them an entirely new statutory liability and to provide creditors with an entirely new remedy not hitherto available to them which would enable them to hold the directors liable singuli et in solidum for company debts and liabilities before the company’s liquidation.”

[19] The applicant submits that the fact that the first respondent is described in the agreement as “the seller’s attorneys”

does not mean that the seller’s attorneys could not act on behalf of the applicant as well. The first respondent, as transferring attorney, accepted payment from the applicant of the purchase price which was to be deposited and invested in trust and paid out on the applicant’s behalf. In so doing, the first respondent assumed a contractual obligation as the applicant’s agent.⁷ As such, a contractual claim arises against the respondents in terms of the provisions of section 53(b) of the Companies Act.

[20] Counsel for the respondents applied to strike out certain paragraphs and Annexures in the replying affidavit on the basis that they constituted new matter. They dealt, in the main, with whether the respondents knew of Pienaar's conduct. However, their ignorance provides no defence to their personal liability in terms of section 53(b) of the Companies Act (as amended) and accordingly it is not necessary to deal with such allegations or the application to strike out.

The Incorrect remedy"

[21] It is common cause that the seller was liquidated before transfer of the property could be effected into the applicant's name. The Insolvency Act⁸ does not deal with the sequestration of the estate of a seller of immovable property. When the estate of the seller of immovable property is sequestered, uncompleted contracts fall to be dealt with in terms of the common law or in terms, of section 22 of the Alienation of Land Act, 68 of 1981.⁹

[22] The applicants referred to *Glen Anil Finance (Pty) Ltd v Joint Liquidators, Glen Anil Development Corporation Ltd (In Liquidation)*¹⁰ in which Trengrove JA held in relation to the insolvency of the seller:-

" His insolvency does not ipse jure terminate the contract The trustee of his estate has an election - which he must exercise within a reasonable time - either to enforce the contract or to terminate it. He makes his election with due regard to the interests of the concursus creditorum, and neither the purchaser nor the cessionary, in a case such as the present, has any say in the matter. However, if the trustee decides to terminate the contract, the purchaser cannot insist upon transfer of the land even though he may already have paid a substantial portion or all of the purchase price thereof. He would, in such a case, have no more than a concurrent claim for damages against the insolvent estate. "

[23] In the present case, it appears unclear whether the liquidator has made such election. Applicant contends that it cancelled the agreement on 17 May 2011 and that the liquidator never informed the applicant that his cancellation was not accepted. However, on the facts before me, the liquidator dealt with the applicant's claim by stating that they would only consider abiding the contract if payment of R14 026 066.19 is made. The applicant has made full payment to the seller's attorneys. This payment would discharge applicant's obligation¹¹, but does not, as respondents' counsel submitted, mean that it amounts to payment to the seller in the circumstances of this case. In terms of the agreement, the seller was only entitled to payment on transfer of the property. It accordingly appears that the applicant's only remedy as against the seller's estate would be a concurrent claim for damages against the insolvent estate.

[24] The contention by the respondents that the applicant adopted the incorrect remedy and could have insisted upon transfer of the property is accordingly not viable.

In the result, the following order is made:

1. The First Respondent is placed under final winding up.
2. The second, third and fifth respondents are ordered, jointly and severally, the one paying, the other to be absolved, to pay to the applicant:
 - a. the amount of R14 026 066,40 plus interest thereon at the rate of 15,5% per annum from 12 September 2012 to date of final payment;
 - b. Costs of suit, including the costs of two counsel

S WEINER

JUDGE OF THE HIGH COURT

Counsel for the Plaintiff: Adv. C.H.J. Badenhorst SC

Adv. J.G. Botha

Plaintiff's Attorneys: Benater Attorneys

Counsel for the Defendant: Adv. M.R. Heliens SC

Defendant's Attorneys: Edward Nathan Sonn&nbergs INC

Date of Hearing: 13 February 2013

Date of Judgment: 20 February 2013

1 1992

(2) SA 322 (N) at 328

2 1997

(1) SA 710 (A)

3See Footnote 2 Supra.

4See Paragraph 10 Supra.

5Ibid

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7See Basson v Remini Supra Paragraph 9; Probert v Baker 1985 (3) SA 429 (A) at 441; 443- 444; Townhouse CC v Berrange and Another 1998 (4) 189 All SA at 189

9See Mars, The Law of Insolvency in South Africa (9th Edition) Bertelsmann, Evans et at at paragraph 12.3, page 227; insolvency Law and its operation in winding up, Meskin (ed by Galgut, Magid etaf) at paragraph 5.21.1.

10 1981

(1) SA 171 (AD) at 182

11See Footnote 8 Supra

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