

SOUTH AFRICA / JUDGMENT

Nkuni Holdings (Pty) Ltd v Hewan and Another (7643/2012) [2012] ZAGPJHC 74 (26 April 2012) [2012] ZAGPJHC 74

COURT

South Gauteng High Court, Johannesburg

BEFORE

FHD Van Oosten

CASE / FILE NUMBER

7643/2012

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REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT

(JOHANNESBURG)

CASE NO 7643/2012

DATE:26/04/2012

NOT REPORTABLE

In the matter between

NKUNI HOLDINGS (PTY) LTD APPLICANT and TIMOTHY ELLIOT HEWAN FIRST RESPONDENT
O'HAGAN ATTORNEYS SECOND RESPONDENT

Practice – interim interdict pendent lite – monies fraudulently misappropriated - undertaking to refund from proceeds of sale of property – property sold and proceeds held in trust by conveyancing attorneys – retention of pending action to be instituted - whether identifiable fund - anti-dissipatory and preservation orders distinguished – requirement of showing a prima facie case – considerations affecting – interim relief granted.

J U D G M E N T

VAN OOSTEN J:

- [1] This is an application for an interdict pendente lite which was initially brought by way of urgency. The matter, however, was postponed and eventually, some 4 months later, came up for hearing before me.

- [2] The background facts of the matter are the following. The applicant is a holding company with four subsidiary companies. The first respondent (Hewan) was the managing director of the applicant and the director of three of its subsidiaries. On 3 June 2011 Hewan resigned as director of all the entities, because, so the applicant alleges, he while involved in the daily activities of the applicant, “authorized unlawful and/or undue payment to himself and third parties to the value of approximately R1 900 000.00”. Mr Simon Baillieu, a director of the applicant and the deponent to the affidavits on behalf of the applicant, confronted Hewan with the discovery, and, so he states:

‘Hewan acknowledged that he made the unlawful deductions from Nkuni Holdings (Pty) Ltd. He agreed with me, on or about 9 June 2011, that he would repay the monies due to the applicant from the proceeds of the sale of his property situated at Woodridge Manor, 27 Cottesmore Road, Bryanston. Hewan informed me that the property was in the market for sale and that he expected the property to be sold towards the end of 2011.’

The registered owner of the property, however, was a company known as Oaktree Properties (Pty) Ltd, of which Hewan and his wife were the only directors. It is common cause that the property was sold on 12 December 2011, for a purchase price of R5,2m, and that the net proceeds of the sale, paid on registration of transfer, in the sum of R4 941 118.74, are held in trust by the transferring attorneys, the second respondent, who have undertaken in regard thereto, to maintain the status quo, pending the finalisation of this application.

- [3] The applicant now seeks an order for the second respondent to retain the proceeds of the sale in its trust account, pending the outcome of the applicant’s claim to be instituted, for payment of the amount of “approximately R1,9m” pursuant to Hewan’s undertaking. Hewan opposes the relief sought and the second respondent abides the decision of this court.
- [4] At the hearing before me urgency was no longer in dispute. In the answering affidavit as well as in counsel for Hewan’s heads of argument, the non-joinder of Oaktree Properties was raised by way of a point in limine. It was wisely not persisted with in light of the fact that the company is the alter ego of Hewan and his wife. Counsel for Hewan approached the matter on the basis of the order sought falling into the category of anti-dissipatory orders or, orders for the preservation of funds. The narrow basis for the granting of these orders was highlighted in cases such as *Knox D’Arcy Ltd and Others v Jamieson and Others* [1996] ZASCA 58; 1996 (4) SA 348 (A) 372 and *Investec Employee Benefits Ltd and Another v Electricity Industry KwaZulu-Natal Pension Fund and Others* 2010 (1) SA 446 (W) para [119]-[123], on which counsel relied. I am unable to agree. The applicant’s claim arises from an agreement in terms of which a specific fund (the proceeds of the sale of the property) was identified from which the refund of the admitted embezzled funds would be made. This aspect of the matter distinguishes it from the situation Melunsky J dealt with in *Smith v Daniels and Another* 1997 (4) SA 711 (SECLD). In that matter the learned Judge held that an offer to repay monies lent, from a share to be received from the joint estate, after the conclusion of divorce proceedings, could not be regarded as an identifiable or an earmarked fund from which the payments would be forthcoming. In my view the agreement in the

present matter identified a particular, identifiable fund from which the refund was to be made and I therefore need not discuss this aspect any further.

- [5] Next, it is necessary to consider whether the applicant has satisfied the requirement of showing a *prima facie* case, although open to some doubt. The applicant's version on the alleged unlawful appropriation of funds is set out tersely and is unsupported by details. In addition to what I have set out above, the only further allegation of relevance is that the matter has been reported to the police. But, Hewan's version suffers from the same defect: he quite craftily steers clear from incriminating

allegations. He merely denied the allegations of having misappropriated the funds or having agreed to repayment thereof. He, however, admits that the matter has been reported to the police but says nothing further in this regard. The court is accordingly faced with a denial which in the nature of motion proceedings and the Plascon-Evans rule, might well have been sufficient to avert interim relief being granted. But, the enquiry does not end there. Annexed the replying affidavit is an email addressed by Hewan to one Henri Thompson of Nkuni Holdings, dated 10 June 2010, some 7 days after his resignation, in which he expressed himself as follows:

'Simon requested me yesterday to put in writing a time line for the repayment of the R2,6m they are demanding be returned to Nkuni to prevent further action. We discussed this on Wednesday at your house. I cannot emphasise how serious this has become – we are talking fraud and jail for both of us.'

The reference to "Simon", one can safely assume, is to the deponent of the applicant's affidavits. I am alive to the fact that the email has only been disclosed in the replying affidavit. No opportunity was sought to respond thereto. The nature and impact of the communication cannot be reconciled with Hewan's bare denial of the allegations made against him. I am accordingly satisfied that the applicant's allegations concerning the alleged fraud and agreement to refund, are sufficient to establish a *prima facie* case, although open to some doubt. In the light hereof, the balance of convenience clearly favours the applicant. The interim relief sought must be considered against the background of an alleged fraud. The possibility of further unlawful conduct, especially where a police investigation may well follow, cannot be discarded.

- [6] I am satisfied that the granting of interim relief will be appropriate in the circumstances of this case. The order I propose to make will, however, be limited to the second respondent retaining of the amount of R1,9m, which is the amount of the applicant's proposed claim. Counsel for the applicant submitted that the legal costs of the proposed action should be added to the amount. I am unable to agree. The applicant is plainly not entitled to security for costs.

- [7] In the result I make the following order:

1. Pending the finalisation of an action to be instituted by the applicant against the first respondent and Oak Tree Properties (Pty) Ltd, within 15 days of the date of this order, the second respondent is ordered to retain in its trust account, or an interest bearing investment account, the sum of R1,9m from the proceeds of the sale of the property described as Woodridge Manor, 27 Cottesmore Road, Bryanston.
2. The costs of this application shall be costs in the action referred to in paragraph 1 above.

FHD VAN OOSTEN

JUDGE OF THE HIGH COURT

COUNSEL FOR APPLICANT ADV L VAN DER MERWE

APPLICANT'S ATTORNEYS MALAN KRUGER INC

COUNSEL FOR RESPONDENT ADV ARG MUNDELL SC

RESPONDENT'S ATTORNEYS SCHWARTZ-NORTH INC

DATE OF HEARING 25 APRIL 2012

DATE OF JUDGMENT 26 APRIL 2012

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Prepared on 10 October 2026 · Esheria