

SOUTH AFRICA / JUDGMENT

Oosthuizen and Another v Robberts (23669/2004) [2008] ZAGPHC 274 (12 September 2008) [2008] ZAGPHC 274

COURT

High Courts - Gauteng

BEFORE

Seriti

CASE / FILE NUMBER

23669/2004

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IN

THE HIGH COURT OF SOUTH AFRICA /ES
(TRANSVAAL PROVINCIAL DIVISION)

CASE

NO: 23669/2004

DATE:

12/9/2008

NOT

REPORTABLE

IN

THE MATTER BETWEEN

CATHERINA

ELIZABETH OOSTHUIZEN 1ST PLAINTIFF

FRANS

LANGFORD 2ND PLAINTIFF

AND

JAN

HENDRIK ROBBERTS DEFENDANT

JUDGMENT

SERITI, J

[1] Introduction

This matter came to Court by way of action.

The Plaintiffs are both Insolvency Practitioners and are acting in their capacities as duly appointed liquidators of two liquidated

close corporations, namely Multilayer Trading 260 CC, with registration number 2001/055879/23 and Extra Commerci CC with registration number 1999/52898/23, which two close corporations traded under the names Martin Smit Financial Services and Extra

Commerci Makelaars CC respectively.

[2] The abovementioned close corporations were both liquidated on 8 October 2002.

The Defendant is sued in his personal capacity. He entered appearance to defend, pleaded on the Plaintiffs' Particulars of Claim

and also instituted a counter-claim.

The Plaintiffs pleaded to the counter-claim.

[3] Plaintiffs' Particulars of Claim

The Plaintiffs allege that from 20 December 2001 up to 17 July 2002 one or both of the liquidated close corporations mentioned above made various payments to the Defendant amounting to R168 000,00. In fact the payments made, on various dates from 16 April 2002 up to 17 July 2002, came to a total figure of R73 400,00.

At all relevant times when the entities mentioned above made payments to the Defendant, their debts or liabilities exceeded their assets.

[4] The payments made to the Defendant mentioned above constituted a disposition as contemplated or defined in section 2 of the Insolvency Act 24 of 1936.

[5] The Particulars of Claim further alleges that the payments made to the Defendant mentioned above, were made without any value having been received by the close corporations. In terms of section 26 of the Insolvency Act, the Court is entitled to set aside the said dispositions and order the Defendant to repay to the close corporations the said payments.

[6] Alternatively, the Plaintiffs allege that the Defendant was a creditor of one or both of the close corporations mentioned above and the payments were made on their behalf, and the said payments were made with the purpose of preferring the Defendant over and above the other creditors of the close corporations.

[7] In terms of section 30 of the Insolvency Act, *supra*, this Court is entitled to set aside the dispositions mentioned above and order the Defendant to repay the close corporations the amounts mentioned above.

[8] In the second alternative, the Plaintiffs allege that the dispositions mentioned above were made within a period of six months

prior to the liquidation of the close corporations and that had the effect that the Defendant was preferred over and above the other creditors of the close corporations. Consequently this Court is entitled to order the Defendant to repay the amounts made to him by the close corporations.

[9] In the third alternative, it is alleged that during the periods 12 December 2001 to 17 July 2002, the Defendant and the close corporations entered into various agreements, which were partly written and partly oral.

In terms of the said agreements,

(a) the Defendant deposited certain amounts of money with Extra Commerci Brokers CC and/or Multilayer Trading 260 CC, which amounts

are referred to as capital;

(b) the Defendant would earn interest on the said capital;

(c) the capital amount together with interest would be repaid to the Defendant as reflected on the agreements.

[10] In compliance with the agreements referred to in the previous paragraph, the Defendant invested certain sums of money with Extra Commerci CC and/or Multilayer Trading 260 CC at different times. In turn, the close corporations paid certain sums of money to the Defendant on certain dates.

[11] The agreements entered into by the Defendant and the close corporations were unlawful because, *inter alia*:

(a) the business of Extra Commerci CC and/or Multilayer Trading 260 CC entail accepting deposits from the public as envisaged in the Bank Act 94 of 1990, without the two close corporations being registered as required by the law;

(b) the business operations of Extra Commerci CC and/or Multilayer Trading 260 CC were unlawful as determined by section 12 (6A3) of the Harmful Business Practices Act of 1988;

- (c) the scheme was an unlawful pyramid scheme, which would not have sustained itself without prejudicing other so-called investors, as it did not generate any income whatsoever.

[12] The Plaintiffs are entitled to claim the money the close corporations paid to the Defendant.

Defendant's Special Plea

- [13] The Defendant pleaded that a certain Mr Stephanus Johannes van Eeden operated an illegal pyramid scheme under the auspices Extra Commerci Brokers CC.

He paid the alleged investment money in cash to Mr Van Eeden's employee by the name of Martin and in turn he received interest, in cash, from the said Martin.

He denies that the close corporation had any assets nor did they dispose any of their assets.

He was not aware that Mr Van Eeden was operating an illegal pyramid scheme.

Plea on the merits

- [14] Defendant admitted that he received the amounts mentioned in the Particulars of Claim but he was not aware that Extra Commerci

Makelaars CC was operating an illegal pyramid scheme.

As the loan contracts between Extra Commerci Makelaars CC were void, he was entitled to a refund of money he advanced. He paid a total amount of R240 000,00 from 1 January 2001 up to 16 May 2002 and he received a total amount of R168 000,00 at different times, the last payment made to him on 17 July 2002.

- [15] He admits that he is a creditor of Extra Commerci Makelaars CC but not of Multilayer Trading 260 CC.

Every payment he received, he gave value therefore.

The amount of R60 000,00 he received on 12 February 2002 was repaid to the close corporation on 14 February 2002.

- [16] Payments made to him were to keep the pyramid scheme going but not to prefer him over other creditors and that all the creditors of Extra Commerci Makelaars CC were paid in full at time of the liquidation of the latter.

- [17] The payments, receipts and dates thereof are not in dispute.

He denies that sections 29 and 30 of the Insolvency Act, supra, are applicable to this case.

He paid to the Plaintiffs an amount of R21 600,00 under a wrong impression that in terms of section 26 of the Insolvency Act, supra, the said amount was due to the Plaintiffs and he is entitled to repayment of the said amount.

Defendant's counter-claim

[18] For convenience sake, the parties will be referred to as in the Particulars of Claim.

He alleges that he made payments totaling R240 000,00 to a certain Martin, an employee of Mr Stephanus Johannes van Eeden

or alternatively of Extra Commerci Makelaars CC and in return he was repaid R168 000,00. He was not aware that Mr Van Eeden alternatively Extra Commerci Makelaars CC was operating an illegal pyramid scheme.

[19] He was entitled to refund of the moneys he paid. He paid to the Plaintiffs an amount of R21 600,00 under a wrong impression that he was indebted to Mr Van Eeden or Extra Commerci Makelaars CC.

As the amount was not due to Mr Van Eeden or entity mentioned above, he is entitled to refund of the said amount of R21 600,00.

Plaintiffs' plea to Defendant's counter-claim

[20] Plaintiffs allege that in terms of the Companies Act 61 of 1973, Close Corporation Act 69 of 1984 and the Insolvency Act, supra, the Defendant was duty bound to refund the said amount of R21 600,00.

Plaintiffs' evidence

[21] The witness who testified on behalf of the plaintiffs is Mr Frans Langford. He testified that he is an insolvency

practitioner and one of the appointed liquidators of Multilayer Trading 260 CC and Extra Commerci CC.

[22] After their appointment as liquidators they carried out investigations which revealed, inter alia, that the above-mentioned two entities were operating illegal pyramid schemes. They also found that the said two entities made certain payments to the Defendant, which payments and dates of such payments are clearly set out in annexure "A" attached to the Particulars of Claim.

[23] Extra Commerci CC operated a banking account, and payments received were deposited in the said account and payments made were

also made from the said banking account.

[24] A certain Mr Martin Smith was involved with the two entities. He was acting as a manager, accepting payments and making

payments on behalf of the entities, although he was not a member of any of the close corporations.

Mr Stephanus Johannes van Eeden was a member of both entities and he was in overall charge of the entities.

Payments made by the entities to the Defendant prejudiced the other creditors of the entities.

At all relevant times the liabilities of the entities exceeded their assets. Extra Commerci CC traded as Extra Commerci Makelaars CC.

Martin Smith Financial Services was the trading name of Multilayer Trading 260 CC.

[25] In terms of all the agreements entered into between the Defendant and the entities, interest payable to the Defendant was 12% per month.

[26] Some of the payments made to the Defendant were done by Internet banking into the account of the Defendant. The account holder from which the amount was transferred is described as Extra Commerci and account number 9074116040. Other payments were made by cash, including an amount of R60 000,00 deposited into the account of the Defendant on 13 February 2002.

[27] On or about 13 April 2005 the Defendant deposited an amount of R21 600,00 into the banking account of the Plaintiffs.

On or about 16 November 2002 the Defendant submitted to the Plaintiffs a claim of R120 000,00. He was claiming the money

against the estate of Extra Commerci Makelaars CC. He further testified that the two liquidated entities conducted business prior to their liquidation.

[28] Under cross-examination he testified that Multilayer never had any banking account, nor any assets. They could not find any

contracts in the name of Multilayer 260 CC but they found similar contracts in the name of Martin Smith Financial Services.

[29] Extra Commerci CC was trading as Extra Commerci Makelaars CC and Multilayer 260 CC was trading as Martin Smith Financial

Services. When Extra Commerci CC realised that interest that has to be paid to the so-called investors was too high, they cancelled the contracts and "re invested" the money into Martin Smith Financial Services.

[30] During their investigations, they found an amount of R40 000,00 in the motor vehicle boot of Mr Van Eeden. A lot of the so-called investors did not receive back their money.

Plaintiffs closed their case.

Defendant's evidence

- [31] He testified that he saw in their local newspaper an advertisement about an investment opportunity where an interest of between 10% - 12% per month would be payable on money invested with certain entities. He responded to the said advertisement, and a certain Mr Martin came to see him at his offices. Mr Martin told him that interest will be paid in cash and same will have to be collected at their offices. Mr Martin offered him 12% interest per month.
- [32] He was advised by Mr Martin that they invest the money in "cash loan businesses" all over the country and they charge 30% interest per month. He signed a contract with Mr Martin in his office, and he was advised by Mr Martin that Mr S J van Eeden is the main director of the business.
- [33] He made several payments in respect of the said investment totaling R240 000,00 and he received back only R168 000,00.
- [34] He was referred to a document wherein he acknowledged receipt of an amount of R12 000,00 (apparently on 15 May 2002) and he said that it was a cash amount he received at the offices of Mr Martin but he does not know where the money came from. The acknowledgement of receipt was written on the letter head of "Martin Smit Financial Services".
- [35] He also referred to several cash payments he received on various dates and he said that he does not know whose money it was. Most of the moneys paid to him were in cash.
- [36] At some stage he received a circular as an investor to attend a certain meeting. At the meeting certain documents were handed to them and they were informed to complete them and hand in their claims.
- [37] Under cross-examination he testified that he was paid by the pyramid scheme, namely Extra Commerci CC. Not all his capital investment was repaid to him.

After his evidence, the Defendant closed his case.

Findings

- [38] It is common cause that Extra Commerci CC and Multilayer Trading 260 CC were liquidated on 8 October 2002 and the Plaintiffs were appointed as liquidators of the close corporations mentioned above. In his plea, the Defendant admitted that at all relevant times, when he received payments from Extra Commerci Makelaars Bk and/or Multilayer Trading 260 CC the liabilities of these entities exceeded their assets.
- [39] From 16 April 2002 up to 17 July 2002 the Defendant received an amount of R67 200,00 as interest on his "investment".

There are other payments that Defendant received prior to 16 April 2002, but the said payments are not relevant for the purpose of this judgment and I will not make any reference to the said payments.

In his evidence in chief the Defendant testified that he does not know where the money that was paid to him came from, but under

cross-examination he testified that the money that was paid to him came from the pyramid scheme, namely Extra Commerci CC which, according to the evidence of Mr Langford, had a banking account. Some of the payments made to the Defendant were made from the said banking account via internet banking.

[40] In his heads of argument and during oral argument, the Plaintiffs' counsel submitted that their claim is based on section 29 of the Insolvency Act, *supra*.

Section 29 of the Insolvency Act, *supra*, reads as follows:

"29. Voidable preferences. - (1) Every disposition of his property made by a debtor not more than six months before the

sequestration of his estate or, if he is deceased and his estate is insolvent, before his death, which has had the effect of preferring

one of his creditors above another, may be set aside by the Court if immediately after making of such disposition the liabilities of the debtor exceeded the value of his assets, unless the person in whose favour the disposition was made proves that the disposition was made in the ordinary course of business and that it was not intended thereby to prefer one creditor above another."

[41] It is common cause between the parties that the payments under consideration took place not more than six months prior to the liquidations of the close corporations in question.

Mr Langford, whose evidence this Court can safely rely on, testified that the dispositions made to the Defendant had the effect of preferring one of the creditors above the others. He further testified that a good number of the "investors" of the

close corporations did not receive moneys they invested in the illegal pyramid scheme.

If one takes into account the manner in which illegal pyramid schemes operate, I have no doubt in my mind that the evidence of Mr Langford to the effect that the payments made to the Defendant had the effect of preferring the Defendant above the other creditors.

[42] In terms of section 29, *supra*, there is a statutory defence available to the Defendant, namely:

- (i) that the disposition was made in the ordinary course of business; and
- (ii) that the disposition was not intended to prefer one creditor above another.

In *Simon NO and Others v Coetzee* All SALR 2007[2] 110 (T) at 120 paragraph 45, MOTATA, J said the following:

"The defendant in accepting the payment relied on what Mr Le Roux, the financial director of ITI had told him. It is not his personal knowledge or belief that would have made the payment one in the ordinary course of business. The objective

facts

of the matter would determine whether the payment was or was not one made in the ordinary course of business. See *Illings (Acceptance) Co (Pty) Ltd v Ensor* NO 1982 1 SA 570 (A) at 581A.

In *Klerck NO v Kaye* 1989 3 SA 669 (CPD) at p678C SCOTT AJ said the following:

'It follows that the conclusion to which I come with regard to the fourth question is that by reason of the usurious interest charged,

the dispositions in the present case were not made in the ordinary course of business within the meaning of s 29 of the Insolvency Act."

"A further consideration why the disposition to Summerfeld cannot in my view be described as being within the ordinary course of business was the manner in which payment was made. The businesslike manner of making payment would obviously have been for Felthan to give Summerfeld a cheque drawn by him (Felthan) on his own bank account."

[43] Applying the principles enunciated in the above-quoted cases, and taking into account the alleged investment and the usurious

interest that was paid and the manner in which same was paid (at times paid by cash which had to be collected from the offices of Mr Smit), my view is that the Defendant has failed to discharge the onus of proving that the dispositions were made in the ordinary course of business.

In the light of the conclusion I arrived at in the previous paragraph, I do not believe that it is necessary for me to deal with

the second leg of the defence available to the Defendant in terms of section 29 supra.

[44] In the pleadings, the Defendant raised a special plea. If I understand the special plea properly, the Defendant alleges that he denies that the close corporations had any assets nor did they dispose any of their assets.

The said allegation flies in the face of available evidence. As stated earlier, one or more of the payments were made to the

Defendant's account via internet banking.

Mr Langford also testified that during their investigations, they found furniture belonging to Extra Commerci CC and money in the latter's banking account.

[45] The Defendant during his evidence in chief testified that he was paid cash, at the offices of Mr Martin, but he did not know where the money came from or whose money it was. During cross-examination he testified that payments were made to him by the pyramid scheme, Extra Commerci CC.

[46] My view is that the Defendant, in law, failed to adduce acceptable evidence to sustain his special plea and consequently same

should be dismissed.

[47] It is common cause between the parties that when summons were issued in this case, the Defendant paid the Plaintiffs an amount of R21 600,00 on the advice of his attorney.

I cannot find any legal basis upon which the Plaintiffs will be entitled to retain the said R21 600,00 nor was I referred to any such authority.

The Plaintiffs' counsel, correctly so in my view, submitted that if the Court finds in favour of the Plaintiffs on the main claim, when satisfying the judgment granted against him, the Defendant can take into account the R21 600,00 he paid to the Plaintiffs.

[48] To a very great extent, the Plaintiffs have succeeded in their claim and my view is that they are entitled to costs on an

appropriate Magistrate's Court scale.

I therefore make the following order:

- (a) The Defendant's special plea is dismissed.
- (b) The Defendant is to pay the Plaintiffs an amount of R45 600,00 plus 15.5% interest per annum a tempore morae until final payment is made.
- (c) The Defendant is to pay the Plaintiffs' party and party costs on an appropriate Magistrate's Court scale.

W L SERITI

JUDGE OF THE HIGH COURT

23669-2004

HEARD ON: 5 SEPTEMBER 2008

PLAINTIFFS' COUNSEL: H S GOOSEN

INSTRUCTED BY: TINTINGERS INCORPORATED

DEFENDANT'S ATTORNEY WHO APPEARED ON BEHALF OF THE DEFENDANT: G P MILLS

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