

SOUTH AFRICA / JUDGMENT

Uys and Another v Investgold Close Corporation (2011/45744) [2013] ZAGPJHC 117 (3 May 2013)

[2013] ZAGPJHC 117

COURT

South Gauteng High Court, Johannesburg

BEFORE

P Boruchowitz

CASE / FILE NUMBER

2011/45744

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REPUBLIC OF SOUTH AFRICA

THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 2011/45744

DATE:03/05/2013

In the matter between-

UYS, DIRK.....1ST PLAINTIFF

TROSIE, MARIESA.....2ND PLAINTIFF

and

INVESTGOLD CLOSE CORPORATIONDEFENDANT

JUDGMENT

[1] This is an action for delivery of certain gold coins and, in the alternative, for the payment of damages. The first plaintiff is Mr Dirk Uys and the second plaintiff, his fiancée and business partner, Ms Marisa Troskie. The defendant is Investgold CC, which carries on business as a dealer in collectable gold coins and Kruger Rands. The business is conducted from premises known as “Knox Vault Building”, situated at 1 River Street, Killarney, Johannesburg.

[2] It is common cause that a sale agreement was entered into between the parties on 19 January 2011, in terms of which the plaintiffs

purchased a number of Kruger Rands and rare coins for a purchase price of R1 557 800.01. This sum was paid in cash by the plaintiffs

to the defendant on that date.

- [3] There is a dispute as to whether delivery of the coins was effected. The defendant pleads that they were delivered to the first plaintiff, acting on his own behalf and on behalf of the second plaintiff, on 26 January 2011, but this is denied by the plaintiffs.
- [4] The factual background to the claim emerges from the testimony of the first plaintiff (Uys); Mr Gert Erasmus, the general manager of the defendant (Erasmus), and Ms Raynal Burger, a receptionist in the employ of the defendant (Burger). It is unnecessary to refer to all of the evidence led and I will confine myself to those aspects that are relevant.
- [5] In broad outline, the relevant facts are as follows: In 2009, Uys contacted the defendant with a view to purchasing Kruger Rands. He was put in touch with Mr Rudi Hugo (Hugo), a broker in the employ of the defendant. Certain electronic exchanges took place between them but nothing came of this. In 2011, Uys received a telephone-call from Hugo, who advised him that Mr Raymond Jardim (Jardim), who was an old school friend of Uys, was also a broker employed by the defendant. An appointment was then made for Hugo and Jardim to visit Uys at his business premises in Brooklyn, Pretoria.
- [6] At the meeting, which was held in early January 2011, Hugo and Jardim sold certain coins to Uys for the sum of R76 000, which Uys paid for in cash. Uys also indicated that he wished to purchase Kruger Rands and that he had a cash sum of R1 million available for such purpose. Hugo and Jardim advised him of the need to make disclosure to the South African Revenue Service in terms of the Financial Intelligence Centre Act, No 38 of 2001 (FICA), but stated that this was not a problem because they had a method “to get around the law”. Uys had no objection to this.
- [7] On 19 January 2011 Uys attended at the offices of the defendant in Killarney, Johannesburg. He asked for Jardim and was shown to a cubicle in the defendant’s premises. Hugo then arrived. Uys had R1 600 000 in cash on him and advised them that he and Troskie wished to purchase Kruger Rands for R650 000 and to utilise the balance of the cash to purchase rare gold coins. The question of compliance with FICA was again raised. Hugo and Jardim stated that they could get around the requirements of FICA by booking the coins in their own names. They indicated that they usually did this when large amounts of cash were involved and had recently followed this procedure in a R2 million cash transaction with another client. Uys was required to pay R500 000 to them and the balance was to be given to a firm known as Hawk Security, who would pay the moneys over to the defendant.
- [8] Written quotations were then prepared in which Jardim was reflected as the purchaser of Uys’ coins and Hugo as the purchaser of Troskie’s coins (Exhibits A1, 3, 5 and 6). Erasmus explained that when these quotations came to the attention of the defendant on 21 January 2011, the defendant created new quotations reflecting Uys and Troskie as the purchasers of

the coins and that the following further documents were also automatically generated by the defendant's administrative system: a tax invoice, a picking slip, a supply invoice and a delivery note (A16-26 and B16-19).

- [9] At the meeting, Hugo and Jardim also asked Uys whether he intended to take the purchased coins away or leave them in storage in Investgold's safe. Uys inquired how safe the storage facilities were and was told that there were watchmen on the roof and that the defendant's storage facilities were "safer than Fort Knox". It was explained to Uys that if he used the defendant's storage facilities he could only withdraw coins on the giving of two days' notice and that two signatures would be necessary before the coins could be collected. Uys was shown Exhibit A11; this was a manuscript document on a fax cover sheet of the defendant which was drawn by Hugo. Exhibit A11 reflected that

the coins could only be withdrawn on two days' notice and under the authority of two signatures. A11 was signed by both Hugo and Jardim, whose cell-phone numbers are also reflected on the document.

- [10] The sum of R1 600 000 was then paid to the defendant in the following way: R500 000 was paid directly to the

defendant in cash, and the balance handed to a man who ostensibly represented Hawk Security. It is common cause that the full purchase price was paid by Uys and received by the defendant.

- [11] It was arranged that Uys would return to the defendant's premises on 26 January 2011 to collect the coins.

- [12] Uys returned to the defendant's premises on 26 January

2011. He asked to see Jardim. He was shown into a cubicle where

Hugo and Jardim were already present. Hugo was in possession of several documents, including certain "picking slips"

(Exhibit A18 and 24; B12, 13, 14, 17, 18 and 24). The relevance of the picking slips will become apparent below. The cubicle was divided by a counter and a glass screen. Behind the counter, on the other side of the screen was the defendant's stock controller, Mr Rafiq Davids. Hugo handed the picking slips to Davids, who then pushed certain coins underneath the screen into the cubicle where Uys, Hugo and Jardim were sitting. Hugo and Uys then checked that all the coins that had been produced were those that had been purchased. Thereafter, Uys, Hugo and Jardim signed the relevant delivery note (Exhibits A20 and 26 and B19, 25 and 31). Hugo remained in attendance throughout the delivery process but Jardim left the cubicle and returned from time to time.

- [13] Uys noticed, when he signed the delivery notes, that they were made out in the names of himself and Troskie and not in the names of Jardim and Hugo, as had been arranged. He was told that this was purely an internal administrative procedure but that the original transaction was not affected.

- [14] Uys was then again asked whether the coins were to be taken away or stored. Uys telephoned Troskie and asked what he should do. They decided that it would be a wise precaution to store the coins in the defendant's safe. Hugo then went to fetch a bag from his office and helped Uys pack the coins into the bag. They then proceeded through a glass door and downstairs into a small office where Uys was introduced to a lady named Roxi. Hugo told Roxi that Uys was there to put his coins in the safe deposit box. Uys asked Roxi how the system worked. She explained that only two keys were used; Uys would have one and she would have the other and that only these two keys could open the safe. She also explained that there was excellent security involving retina scans and finger-prints. Uys was then led to an area where there were a number of small safes. Roxi opened a safe with the two keys and Uys packed the coins into a drawer in the safe. He took the picking slips and checked that all the coins that had been purchased were packed into the safe. The safe was closed and Roxi locked it with the two keys. Roxi took one key and told Uys that the other was his, which she handed to him. No documentation was issued to Uys.
- [15] It is common cause that the safe in which the coins were housed belonged to a company known as Knox Titanium Volt Co (Pty) Limited (Knox), which was not under the control or supervision of the defendant. Uys testified that he was under the impression that the safes belonged to the defendant as they were located in close proximity to the defendant's offices and he assumed, based on Hugo's representation, that the defendant controlled the safe.
- [16] Sometime later, Uys was summoned to the defendant's offices by Erasmus. He attended at the defendant's premises on 11 March 2011 together with Troskie. Erasmus told him that the coins had been stolen. This came as a great shock. Erasmus disclosed that it had been discovered that Hugo had stolen the coins and that certain of the coins had been recovered from Hugo's house. Erasmus handed these coins over to the plaintiffs. They all then proceeded to the premises of Knox together with Jardim, where Uys was shown an application form which Hugo had used to hire the safe (A12). The application form embodied a forged signature purporting to be that of Uys.
- [17] The Court was referred to affidavits deposed to by Hugo (Exhibits A27; B49 and 51) in which he admitted stealing the coins and inducing Uys to believe that the safe deposit box where the coins were housed at the time of the theft was under the control of the defendant.
- [18] Erasmus, the general manager of the defendant, testified that Hugo was employed by the defendant as a broker. His duties were to sell gold coins. He performed telephonic sales and also made appointments with clients. It was not his function to guard the stock of the defendant. This was the function of the stock controller, Mr Rafiq Davids.
- [19] Erasmus also explained the internal procedure that was followed by the defendant when a customer bought coins. A quotation showing the stock to be purchased was produced. This was sent to the client who, if satisfied, would sign the quotation and send the proof of payment back to the defendant. An invoice, picking slip and delivery note was then

automatically generated by the Pastel system employed by the defendant. The purpose of the picking slip was to instruct the stock controller what coins to pick out of the defendant's stock for purposes of delivery. Once a quotation was accepted by the defendant the picking slip was prepared and left in the reception area of the defendant, where it would be picked up by the broker and handed to the stock controller. The delivery process was triggered once the picking slip was handed by the broker to the stock controller. Ms Raynal Burger, the defendant's receptionist, confirmed that on 26 January 2011 the picking slips pertaining to the instant transactions were collected by Hugo from the reception area and handed to the stock controller.

[20] Erasmus further explained that delivery of the coins could be made in a number of ways: Direct collection, delivery by courier or by safekeeping the coins in the defendant's vaults which were at their Wilderness Branch. If a client wished to keep coins in safekeeping an invoice stating that safekeeping was required would be issued. The Financial Department of the defendant would then issue a safekeeping certificate which was generated at the defendant's Wilderness Branch. This would be signed by the Financial Manager, Mr Jordaan; Mr Robbertse, the Operational Manager, and Mr Gerrit Schwartz, the defendant's Chief Executive Officer. The certificate would be posted by way of registered mail to the client. The stock controller would obtain a picking slip stating that the coins were to be placed in safekeeping and he would move the coins to the safekeeping vault.

[21] Erasmus conceded that the safekeeping arrangements purportedly concluded with Uys were contrary to the defendant's established

procedures. He pointed out that the defendant did not use Knox for the safekeeping of coins, but only employed their services for limited purposes. He also conceded that Hugo and Jardim would have been aware that the storage arrangements concluded with the plaintiffs was irregular.

[22] Erasmus testified further that it was the function of the defendant's stock controller, Davids, to deliver coins on

behalf of the defendant. In cross-examination, he conceded that Davids performed a mechanical function.

[23] In evidence Erasmus initially contended that the broker's function was merely to be present to answer any questions from the client, but later admitted that the broker needed to check that the coins produced by the stock controller were those that had indeed been purchased, and that after such verification the broker had to countersign the delivery notes.

[24] Erasmus further testified that the function of the picking slip was to instruct the stock controller which coins to take out of the system for purposes of delivery. As far as he was concerned delivery took place as soon as the stock controller had completed the paperwork and pushed the coins through the glass partition in the cubicle for at that stage the coins would be out of the stock

controller's physical possession and under the control of the purchaser. As mentioned above, Erasmus conceded in cross-examination

that during the whole process the stock controller performed a mechanical function and that the broker oversaw the handing over of the coins. Erasmus also conceded at some stage in his evidence that the delivery process was not complete merely when the coins were pushed through the glass partition but only after the verification procedure had taken place and all three persons, namely the purchaser, the stock controller and the broker had signed the relevant delivery note(s).

[25] The foregoing is, in broad outline, a summary of the relevant evidence.

[26] The agreement entered into between the parties was a cash sale. As the defendant was the owner of the coins when the sales were concluded, the defendant was obliged in law to transfer ownership of the coins to the purchasers. The defendant's obligation was not limited to the delivery of undisturbed possession (*vacuo possessio*) coupled with a guarantee against eviction (see 2 Lawsa (2ed): para 70 and the authorities there cited; also Norman's Law of Purchase and Sale in South Africa (5 ed) para 12.7.2 pp 118-119).

[27] As a matter of substantive law, the defendant bears the onus of establishing on a balance of probabilities that it delivered the coins to the plaintiffs (*Electra Home Appliances (Pty) Limited v Five Star Transport (Pty) Limited* 1972 (3) SA 583 (W) at 585-586). To discharge that onus the defendant as a juristic person was required to establish that the coins were physically delivered by a duly authorised agent to the plaintiffs with the intention of transferring the right of ownership to them. Upon a contract of sale ownership in the property sold does not pass unless, in addition to giving delivery, the seller has the intention of transferring ownership and the purchaser the intention of becoming the owner. This is often referred to as the real agreement or "saaklike ooreenkoms" (*Air-Kel h/a Merkel Motors v Bodenstein en 'n Ander* 1980 (3) SA 917 (A) at 922; see also Silberberg and Schoeman's *The Law of Property* (4 ed) 81, and CG Van der Merwe *Sakereg* (tweede uitgawe) 303).

[28] The defendant, being a juristic person, also has the onus of establishing that at the time of delivery of the coins it was

represented by a person or by persons who had the intention to pass ownership to the plaintiffs. This requirement is brought into stark relief in the present matter. It is important to know whether in effecting delivery of the coins the directing mind of the defendant was Hugo, who on the evidence had no intention to pass ownership to the plaintiffs, or whether the directing mind was that of the stock controller, Davids, and/or Erasmus. Counsel for the defendant submitted that both Erasmus, who was the general manager, and Davids, the stock controller, had the requisite intention to transfer ownership. Whose intention is to be attributed to the defendant at the relevant time is a question of fact and law.

[29] As Viscount Haldane said in the seminal case of *Lennard's Carrying Co Limited v Asiatic Petroleum Co Limited* [1915] AC 705 at 713:

“... [a] corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation ...”

- [30] The question of attribution has been extensively dealt with in English law. A company being an artificial entity cannot itself act and it is necessary for the law to attribute to it the acts and states of mind of certain natural persons (Lennard's case supra). This would include not only a director of a company, but any natural person who has management and control in relation to the act or omission in question (*El Ajou v Dollar Land Holdings plc and Another* [1993] EWCA Civ 4; [1994] 2 All ER 685 (CA) at 696a-b; also Blackman Commentary on the Companies Act 4-123 to 4-132). The rules of attribution are to be distinguished from the rules of agency (see Blackman 4-127 to 4-129).
- [31] The directing mind of a company is not necessarily that of the persons in general management and control of the company, but would include persons who have management and control in relation to the act or omission in point (*El Ajou* at 695j-696c). The act will be considered to be that of the directing mind as long as it is performed by the person in question within the sector of the company in operation assigned to him. It cannot be argued that an act was not that of the directing mind of the company because it was beyond the authority of the person in question, and nor does it matter that the directors are unaware of the activity in question or that the conduct had been expressly prohibited by the company (Blackman 4-130 to 4-131 and the reference to the *Canadian Dredge & Dock Co Limited v R* (1985) 19 DLR (4th) 314 (SCC) at 330-331)).
- [32] The rules of attribution as developed in English law have been accepted in South African law (see *Consolidated News Agencies (Pty) Limited (In Liquidation) v Mobile Telephone Networks (Pty) Ltd and Another* 2010 (3) SA 382 (SCA) paras [29]-[31]). The approach to be followed in determining whether a particular act or state of mind is to be attributed to a company is described as follows by Heher JA in para [31]:
- “[31] The authorities relied upon by the parties are not in conflict. Each must of course be read in context. In each case the court strives to determine whether it is the company which has spoken or acted to a particular effect through the voice or conduct of a human agency and is thereby to be held to the consequences, or whether that agency was engaged in an activity which cannot fairly be attributed to the company. Each case raises different facts and the eventual conclusion must depend upon inference and probability in the absence of express evidence of adoption of the statements or conduct as the company's own. Respondents' counsel referred us to the following dictum from *Re Bank of Credit and Commerce International SA (In Liquidation)* (No 15): *Morris v Bank of India**
- [2005] 2 BCLC 328 (CA) as to the kind of factors that a court would look at in determining whether a particular natural person is the directing mind of the company for a particular act or state of mind. The rules of attribution would –

‘typically depend on factors such as these: the agent’s importance or seniority in the hierarchy of the company; the more senior he is, the easier it is to attribute. His significance and freedom to act in the context of a particular transaction: the more it is “his” transaction, and the more he is effectively left to get on with it by the board, the easier it is to attribute. The degree to which the board is informed, and the extent to which it was, in the broadest sense, put upon enquiry; the greater the grounds for suspicion or even concern or questioning, the easier it is to attribute, if questions were not raised or answers were too readily accepted by the board.’

...”

[33] On a proper conspectus of the relevant evidence, and having regard to the probabilities, I am satisfied that the directing mind of the defendant at the time of delivery of the coins was Hugo, assisted by Jardim, and not the persons contended for by the

defendant. It is clear from the evidence that they were associated in all material respects with the transactions with the relevant

transactions and responsible for their implementation. As brokers they were authorised to sell coins and to facilitate their delivery.

They completed all the relevant documentation. Hugo signed the quotation (A5); the picking slip (A18) and the delivery note (A20) in respect of the sixty-three Kruger Rands sold to Troskie. He also signed the quotation (A6); the picking slips (B17 and B18) and the delivery note (A18) in respect of the rare coins sold to Troskie. Jardim signed the quotation (A1); the picking slip (A24) and the delivery note (A26) in respect of the forty-eight Kruger Rands sold to Uys, and he also signed the quotation (A3); the picking slips (B12, B13 and B14) and the delivery notes (B15) pertaining to the rare coins sold to Uys.

[34] Hugo and Jardim arranged for the time of delivery. Hugo was present at all times and Jardim was often present during the

purported delivery process on 21 January 2011. Hugo triggered the delivery process by furnishing Davids with the picking slips. Once the coins were produced and pushed through the glass partition by Davids, Hugo and Jardim actively participated in the verification

process so as to ensure that the correct type and number of coins were to be handed over to the plaintiffs and once satisfied they

countersigned the delivery notes together with Uys and Davids. The delivery notes make specific provision for signature by the broker and stock controller. Without the presence of the brokers delivery of the coins would not have been possible. The delivery process was not completed until the verification procedure had taken place and the delivery notes signed by all parties.

[35] Davids, the stock controller, had no more than a mechanical function and performed his duties subject to the control of Hugo and Jardim. He was given an instruction by them as reflected on the picking slips. When Davids produced the coins reflected on the picking slips Hugo and Jardim ensured that he had performed his function properly and signed the

delivery notes to indicate their satisfaction. It was only at that stage that the delivery note was signed by both the broker and stock controller. Hugo and Jardim were the relevant persons who effected delivery on behalf of the defendant and it is their knowledge and intention which falls to be imputed to the defendant on the basis of the authorities to which I have referred.

[36] It is clear from the evidence that the stock controller had no more than a mechanical function. He was the custodian of the

defendant's stock of coins and once given an instruction by the brokers as reflected on the picking slips produced the coins

reflected on those slips. The stock controller handed physical possession of the coins to the broker and client, who was sitting on the other side of the glass partition. The broker thereupon counted the coins and verified that the correct number and type of coins had been produced. Once satisfied, the broker and stock controller signed the delivery note. The stock controller merely handed physical possession of the coins over to the client and broker for verification. His function and intention was to comply with the instruction given to him by the broker as contained in the picking slips. He participated in the physical transfer of the coins.

[37] Significantly, the defendant did not call as a witness the person or persons who it contends were instrumental in transferring

ownership from the defendant to the plaintiffs. In its initial plea the defendant said that Hugo and Jardim were the relevant persons who effected delivery on behalf of the defendant, but the plea was later amended to reflect Davids. Davids' evidence was material and he could have cast light on the essential question as to whether he, on behalf of the defendant, intended to convey ownership to the plaintiffs. It would appear from Erasmus' testimony that Davids is still employed by the defendant as a stock controller, and that, if called, would have been available to give evidence. The failure to call Davids as a witness suggests that he would not have supported the defendant's contentions.

[38] Hugo's intention throughout was to steal the coins. This is evident from the fact that on the date of the sale, 19 January 2011, he opened a safe deposit box at Knox and forged Uys' signature on the relevant application form (see Exhibit A12). Jardim's role is also highly suspicious. It is clear that he, too, was involved in the scheme to defraud and dispossess the plaintiffs of the coins. The most significant evidence of his involvement is to be found in Exhibit A11. He appended his signature to this document and put his telephone number on it. Both Hugo and Jardim would have been aware of the defendant's standard procedure for the storage of coins and that what they were doing was irregular.

[39] The evidence of Hugo and Jardim would have been most material in regard to the question whether Davids or Erasmus had the necessary intention to convey ownership of the coins to the plaintiffs. The failure by the defendant to call them as witnesses further suggests that their testimony would not have supported the defendant.

[40] Counsel for the defendant argued that Hugo's intention probably was to convey ownership to the plaintiffs in order to

facilitate the theft. I do not agree with that submission. The facts and probabilities are that he intended to fraudulently obtain

physical control of the coins by placing them in the security box to which he had access, to enable him to steal the coins. His

intention to steal is inconsistent with any intention to convey ownership.

[41] For these reasons I am of the view that the knowledge and actions of Hugo and Jardim are to be attributed to the defendant.

The directing or operative mind of the defendant at the time of delivery of the coins was not Davids or Erasmus, but Hugo and Jardim.

[42] It is clear therefore that there was no intention on the part of the defendant to transfer ownership of the coins to the plaintiffs.

The defendant, being a juristic entity, could have only one intention (see *Burg Trailers SA (Pty) Limited v Absa Bank Limited* 2004

(1) SA 284 (SCA) 289B). The presence of an intention to steal the coins on the part of the persons who were the directing mind of the defendant would have prevented the transfer of ownership.

[43] The element of physical possession or detentio has also not been established. It is clear on the evidence that Hugo, assisted by Jardim, were at all material times in control of the coins. Even though the coins were pushed through the glass enclosure by the stock controller, Davids, they exercised de facto control. The fact that Uys handled the coins momentarily during the verification process did not make him the possessor of the coins. Even if I am incorrect in this regard, Uys' physical possession was not accompanied by a concurrent intention by the defendant to convey ownership to the plaintiffs.

[44] For these reasons I am of the view that the defendant has failed to discharge the requisite onus of proving that proper delivery of the coins had been made. The plaintiffs are accordingly entitled to judgment on the main claim.

[45] As the plaintiffs are the successful parties, the costs of the action are to be paid by the defendant. These costs will include the costs consequent upon the employment of two counsel. The matter was in my view of sufficient complexity to warrant the employment of two counsel.

[46] The following order is granted.

The defendant is directed to deliver the following coins to the first plaintiff:

48 x 1 ounce Kruger Rands;
1 x 2009 Rhino Exclusive set;
2 x 2007 Mandela/De Klerk proof set;
2 x 2008 Mandela Bi Metal set;
1 x 2008 Elephant launch proof coin;
1 x 2005 Albert Luthuli proof set;
1 x 2004 Kruger Rand Paul Kruger launch; and
1 x 2007 Mandela/De Klerk 1 ounce.

The defendant is directed to deliver the following coins to the second plaintiff.

63 x 1 ounce Kruger Rands;
1 x 2009 Rhino Exclusive set;
1 x 2007 Mandela/De Klerk proof set;
1 x 2008 Mandela Bi Metal set;
1 x 2008 Elephant Launch proof coin;
1 x 2007 Mandela/De Klerk 1 ounce.

The costs of the action are to be paid by the defendant, which costs are to include the costs of two counsel.

P BORUCHOWITZ

JUDGE OF THE HIGH COURT

COUNSEL FOR THE PLAINTIFFS: H VAN EEDEN SC

with JW STEYN

INSTRUCTED BY: BENTO INC

COUNSEL FOR THE DEFENDANT: NATHAN SEGAL with JW STEYN

INSTRUCTED BY: MARITZ SMITH VAN EEDEN INC

DATE OF HEARING : 30 April 2013

DATE OF JUDGMENT: 3 May 2013

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Prepared on 11 October 2026 · Esheria