

**IN THE HIGH COURT OF SOUTH AFRICA  
EASTERN CAPE DIVISION – EAST LONDON**

Case no: 1399/16

ECD: 3299/16

Date Heard: 6/12/2016

Date Delivered: 24/01/2017

In the matter between:

**CAROL-ANN SCHROEDER N.O**

1<sup>ST</sup> PLAINTITFF

**ZAHEER CASSIM N.O**

2<sup>ND</sup> PLAINTITFF

and

**LONWABO BRIAN MAHLATI**

1<sup>ST</sup> DEFENDANT

**GAIL HILDA MAHLATI**

2<sup>ND</sup> DEFENDANT

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**JUDGMENT**

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**SMITH J:**

[1] The plaintiffs seeks summary judgment against the defendants for payment of the sums of R39 083 148.03 and R4 193 525.95, respectively. They instituted the action in their capacities as joint liquidators of New Creation Construction C.C. ("the close corporation"). The latter close corporation was placed under provisional liquidation on 28 April 2016.

[2] The defendants are married in community of property and their daughter is the sole member of the close corporation.

[3] The plaintiffs' claim against the defendants is founded on the allegation that the said monies were due to the close corporation in liquidation, and had been misappropriated by the first defendant who paid it into an Absa Bank account controlled by him. The monies were paid to the close corporation by the Department of Human Settlements and South African Revenue Services, respectively.

[4] In response to the plaintiffs' application for summary judgment the defendants put up an affidavit wherein they allege that the plaintiffs' particulars of claim do not disclose a cause of action since:

- (a) the claim is one of *rei vindication*, and the plaintiffs have failed to establish that they were in possession of the property when the action was instituted; and
- (b) furthermore, the monies are the property of the bank to which the payments were diverted.

[5] They also aver that the Absa banking account is one "belonging to the New Creation Construction CC and not the first defendant". In support of this contention they put up a letter from Absa which states that:

- (a) the first defendant is the customer; and
- (b) the name of the account is "New Creations Construction".

[6] Mr *de la Harpe*, who appeared for the plaintiffs, correctly argued that none of these contentions are tenable. Even on a perfunctory perusal of the particulars of claim, it is clear that the claims are not vindicatory in

nature but rather based on the unequivocal averment that the defendants misappropriated the funds. The plaintiffs aver that the defendants received the monies by diverting payments made to the close corporation in liquidation into the Absa account controlled by the first defendant. The plaintiffs, in their capacities as duly appointed liquidators of the close corporations were accordingly entitled to sue for the recovery of the misappropriated funds. The defendants made no attempt to gainsay these allegations.

[7] Their contention that the Absa account belongs to the close corporation is, in my view, also clearly disingenuous. The letter which they put up in support of this contention does not sustain that averment. All that it does is to confirm that the first defendant is the "customer" and that the account name is "New Creations Construction". The letter does accordingly not confirm that the close corporation is the account holder, but rather that the first defendant is in control of the account.

[8] There can be little doubt that the payment of monies due to the close corporation in an account (regardless of what it is called) controlled by the first defendant amounts to misappropriation of funds due to the close corporation.

[9] I am accordingly of the view that the defendants have failed to disclose facts necessary to sustain a *bona fide* defence. The plaintiffs are consequently entitled to summary judgment.

[10] In the result there is summary judgment for the plaintiffs in the following terms:

- (a) Payment of the sum of R39 083 148. 03 together with interest thereon calculated at the legal rate of interest *a tempore morae* to date of payment;
- (b) Payment of the sum of R4 193 525. 95 together with interest *a tempore morae* to date of payment ;
- (c) Costs of the suit.

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**J.E SMITH**  
**JUDGE OF THE HIGH COURT**

#### Appearances

|                             |   |                               |
|-----------------------------|---|-------------------------------|
| Counsel for the Plaintiffs  | : | Adv de la Harpe               |
| Attorney for the Plaintiffs | : | Drake, Flemmer & Orsmond Inc. |
|                             |   | Tewkesbury House              |
|                             |   | 22 St. James Road             |

Southernwood  
East London

Counsel for the Defendants : Adv Nzuzo :  
Attorney for the Defendants : Pumla Mncwango Inc.  
10 Douglas Road  
Vincent  
East London

Date Heard : 12 December 2016  
Date Delivered : 24 January 2017