IN THE SOUTH GAUTENG HIGH COURT OF SOUTH AFRICA

JOHANNESBURG

CASE NO: 45666/2011

DATE: 2012-11-28

In the matter between

KENSANI CONSORTIUM (PTY) LTD Applicant

and

KENSANI CORRECTIONS (PTY) LTD First Respondent

FIRST RAND BANK LTD

t/a RAND MERCHANT BANK Second Respondent

J U D G M E N T

WILLIS; J:

[1] The applicant has approached the court by way of motion proceedings for an order in the following terms:

> 1. Declaring that the applicant is entitled to immediately withdraw the full proceeds standing to the credit of the banking account open and operated with the second respondent under account number – 1923-DC00H00034 and bearing the description Kensani

Security Deposit.

2. Directing the second respondent to make payment to the applicant of the amount referred to in paragraph 1 above within a period of seven days of granting of this order.

3. Directing that the costs of this application be paid by any party opposing the application and, if both the first and second respondents oppose the application, that the costs be paid by them jointly and severally, the one paying the other to be absolved.

4. Further and/or alternative relief.

[2] In order to understand this matter some background is first necessary. The Department of Correctional Services wished to build a maximum security prison in Louis Trichardt (now known as Makhado). Such is the ingenuity the skill, the brilliance of our prisoners who have to be confined in maximum security prisons that this maximum security prison required technology, design and methods of construction that were not possible to be found in South Africa.

[3] If one wishes to build maximum security prisons, the best place to look for prototypes is the United States of America. It is there that the Department of Correctional Services went in order to obtain the skills and resources necessary for the building of the maximum security prison in question. The issue has complicated by the fact that in order for the Department of Correctional Services to award a tender that tender had to

be BEE (Black Economic Empowerment) compliant.

[4] To further compound the problem, among the *dramatis personae* were the usual suspects, *viz*., male albinos of a pinkish hue who were born in South Africa. These usual suspects were willing to put in money by way of investment and also to provide skill in terms of raising the necessary finance.

[5] In order to deal with these difficulties, a massive set of different agreements was drawn up involving a number of different parties including Wackenhut Corrections Corporation based in the United States which later changed its name to the GEO Group Incorporated, The South African Custodial Services (Louis Trichardt) (Pty) Ltd, the first respondent, the applicant and banks including First Rand Bank Ltd, BOE Merchant Bank and various other banks as well as an entity known as the SACS Security Trust, the SACS is the South African Custodial Services.

[6] Not only was the South African Custodial Services Louis Trichardt Pty Ltd a party, but also an entity known as 'the Trust, for the time being, for the SACS Security Trust". In addition, not only were there complex agreements drawn up by a battery of highly skilled lawyers around the world, but the following accounts were opened:

1. A disbursement account.
2. A revenue account.
3. A debt service reserve account.

4. A compensation account.
5. The insurance account.
6. The construction insurance account.
7. The maintenance reserve account.
8. The rectification account.
9. The fixed component upside account.
10. The operational reserve account.
11. The indemnity account.

[7] For all I know, there may have been more accounts opened if it were not for the fact that the English language starts to run out of epithets with which to describe the different banking accounts which were opened. The reason, in a nutshell, why these complex agreements were drawn up and why there was these different accounts, is that major investors and parties in America were not prepared to embark on this BEE project if there was any risk that the tender would set aside and that they would lose their money.

[8] In other words, the project was entirely ring-fenced with bank guarantees in the event of there being any difficulties. I think it fair to record that approximately every second week when I am in Motion Court one has a situation where so called 'BEE deals' come to grief. The reason for this is that, in my respectful opinion, you have strange bed fellows forced into unnatural relationships with one another. Before any one rushes off the hill to report me to the Judicial Service Commission

for being a racist or a 'homophobe', let me emphasise that some of my best friends are black and gay. The reason why I refer to this 'unnatural relationship' has nothing whatsoever to do with race or sexual orientation, but everything to do with universal human nature. If one searches the internet under 'suddenly acquired wealth' one will see that there are all sorts of psychologists who have ventured opinions as to the psychological maladies that afflict people who suddenly come into vast sums of money. There are neuroses, such as paranoia and narcissism and all many of insecurities. Relationships with friends become problematic, so do relationships with relatives. One of the chief manifestations of the problem is one known as greed.

[9] There is nothing unique or unusual in this phenomenon of greed. Indeed insights into the damaging consequences of greed go back at least as far as Biblical times. One need only read the book of Proverbs where there are all sorts of warnings about how one should acquire wealth and how one should relate to it. One need only need to refer to the gospel of Luke where there are some interesting discourses concerning wealth.

[10] On the one hand, one has a problem with greed and on the other hand a problem with resentments about paying the money. That is precisely what happened in this particular matter. There was a fall-out between BEE partners and the matter was then referred to trial. After a number of days of trial, the parties reached a settlement before

Monama AJ (as he then was). The settlement agreement reads as follows:

> "The court grants an order;
>
> 1. Declaring the plaintiff to be beneficially entitled to receive from the second defendant from the proceeds standing to the credit of the account opened and operated with the second defendant (bearing the account 1923-DC 00H0034), the sum of R4 371 305 deposited into such account with such interest as accrued on such sum from date of deposit to date of payment.
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> 2. Directing that the second defendant make repayment to the plaintiff of the amount referred in 1 above, upon such amounts becoming repayable under and in terms of the corporate guarantee agreement in common terms agreement, ANNEXURES PC1 and PC2 respectively.
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> 3. Directing that the first respondent pay the costs of suit and in the event of the second defendant defending this action directing that the costs to be paid by the first and second defendants jointly and severely the one paying the other to be absolved, the cost to include the cost of two counsel."

[11] This agreement, and the court order which was made, applied

between Kensani Consortium Pty Ltd as plaintiff (the same legal person who is the applicant in this matter) and Kensani Corrections Pty Ltd as the first defendant and First Rand Bank Ltd as second defendant – in other words, exactly the same persons as are parties to this particular application before me.

[12] Although there was initially some argument about the matter, it is quite clear, upon a plain reading of clause 2, that the order in clause 1 is dependent *inter alia* upon certain amounts being due in terms of the 10 'common terms agreement', the so-called 'CTA'. Mr *Subel*, who appeared for the applicant, had an affinity for describing this as 'a time clause'. To my mind, it is a suspensive condition but, in the of the matter, it does not really matter. I accept that a time clause has the element of inevitability that a suspensive condition does not have.

[13] One therefore needs to have regard to what the so called CTA provided. The CTA agreement provides as follows at Clause 4:

> "4.1 As security for the fulfilment of its obligations under this guarantee, the guarantor shall 20 simultaneously the executioner's guarantee –
>
> 4.1.1 Deposit an amount equal to 50% of the then prevailing deposit account into the bank account; and
>
> 4.1.2 Cede all its right, title and interest in and to the

bank account to the security trustee on the terms and condition of the cession.

4.2 For so long as this guarantee remains in force and effect, the guarantor shall –

4.2.1 At such times as the security trustee may request in writing, on first demand, deposit such further amount into the bank account as will, taking account of the increase in the then required balance in the rectification account in accordance with the Consumer Price Index over the immediately preceding year or such other period that may be applicable in the circumstances; or

4.2.2 Be entitled, at any time, to withdraw from the bank account such amount at will, taking into account the then required balance in the rectification account as aforesaid, ensure that the guarantor will maintain the value of the security deposit provided for in Clause 4.1 at all times equal to 50% of the difference between the then current balance in the rectification account, and the then required balance thereof as contemplated in Clause 2.2 hereof."

[14] There was some argument as to whether this clause did indeed envisage that it could be possible, from time to time, that there was more money in this particular bank account at any particular time than was required in order to maintain the guarantees. If I understood Mr *Hodes*, who appeared for the first respondent, correctly he did not persist with this point or if he did, he did so faintly, that this was not the correct interpretation.

[15] Quite plainly, clause 4.2 envisages that, provided there are surplus funds above that necessary to maintain the guarantee, these could be paid out. The other interpretation would require that the funds remain there until the year 2027. Given the fact that one had expert lawyers on all sides preparing the documentation, it is inconceivable that it could have been the intention of the parties that money due should be have to wait until 2027 for pay out, that surplus money should loll about in this account unutilised until the year 2027. There was also an argument that the CTA agreement provided for the Kensani Corrections to be the party rather than the Kensani Consortium but again, after some argument, if I understood Mr *Hodes* correctly, he conceded that clause 2 of the order granted by Monama AJ on 19 May 2010 necessarily required (and that this was in fact the intention of the parties) that it was to be read as if the surplus was to be paid to the applicant.

[16] Accordingly, it is clear that, if there are surplus funds in this relevant bank account, the applicant is entitled to receive those surplus funds.

[17] There was also an argument about whether a so called ‘arbitration clause’ in an agreement entered into that may have affected the parties prior to 2010 and a so called ‘exit agreement’ that was entered into prior to 2010 should apply. There is no merit in these submissions precisely because, at a later date, all that was superseded by an agreement made with the concurrence of the parties and made an order of court in May 2010.

[18] The question then arises whether there were indeed fund surplus in the account to the requirements necessary to maintain the particular guarantees. The following allegations are made in the founding affidavit by the applicant.

> "10.5 During or about December 2010 I, as a Director of the applicant, considered the quarterly report of GEO (that is the successor to the American Company Wackenhut Corrections Corporation) and having done so discovered on page 23 thereof that GEO had been paid a dividend of $3 900 000 by SACS during a 39 week period ending 3 October 2010. A copy of page 23 of the GEO quarterly report is attached hereto marked "FA5". The full report will if required by the above honourable court be made available at the hearing of this application.
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> 10.6 As the applicant had never been advised by

either SACS or the second respondent that the amount of ZAR7 500 000 index had been paid into the rectification account on 22 February 2011. A letter, a copy of which is annexed hereto marked "FA6" was directed to SACS advising that the payment of any dividend without the deposit required in terms of 6.13 of the CTA having been made was in breach of the CTA. The applicant demanded the SACS to rectify its breach within five business days of "FA6", failing which it would take steps to enforce its rights in terms of the CTA.

10.7 On 30 March 2011 a letter was received from SACS addressed to the applicant, a copy of which is annexed hereto marked "FA7" in which SACS advised *inter alia* that there had been no breach of Clause 6.15.1 of the CTA. Without saying so in so many words SACS implied that the amount of ZAR7 500 000 (index) had been deposited into the rectification account.

10.8 It has subsequently been established by the applicant and become common cause between the parties to this application that the amount of ZAR7 500 000 (index) had been deposited into the rectification account and that there currently exists no difference between the current balance and the

required balance in the rectification account."

[19] In the answering affidavit, the first respondent replies as follows:

> "The fact that dividends were paid during or about October 2010 does not mean that the dividends were automatically be paid or payable for each and every year going forward during the life of the prison. If the rectification account is depleted as a result of a Schedule F, defaults event SACS will no longer thereafter be entitled to pay dividends to shareholders."

[20] Mr *Hodes*, who was not shy to remind me that he had been in practice as an advocate for 48 years, sought to educate me as to the law relating to the admissibility of hearsay evidence. The experience was refreshing. If I understand Mr *Hodes*' argument correctly, it is that inadmissible evidence carries with it a permanent stain. It is indelible. It cannot be removed. It is rather like the ink from an octopus: once it penetrates a garment it remains there forever. The imagery is mine and not Mr Hodes'. I accept full responsibility for it. While I look forward to the golden jubilee celebrations which will no doubt be around the corner when Mr *Hodes* celebrates his 50 years of successful practice as an advocate, I regret to record that I remained unilluminated by his particular interpretation of the law relating to the admissibility of hearsay evidence.

[21] Mr *Hodes* referred me, with a flourish, to the case of the *President of the Republic of South Africa and Another v South African Rugby Football*

Union and Others 2000 (1) SA 1 (CC). He submitted (and here I am in full agreement with him) that every lawyer in South Africa knows about this case. It is indeed a very well known case, perhaps because two great South African passions, rugby and politics collided with one another, ultimately in the Constitutional Court. Mr *Hodes* referred me especially to the passage in paragraph [105] which is never to be forgotten not only, by lawyers, but also is never to be forgotten by judges throughout South Africa. The Constitutional Court issued a stern rebuke to the High Court for having regard to evidence of a hearsay nature as to what President Nelson Mandela had said and done and which President Mandela had not admitted. The facts in this particular case are clearly distinguishable. As I recorded in the answering affidavit, the first respondent admits having received the alleged dividend in question.

[22] Mr *Hodes* also relied very heavily on the case *Gore v Amalgamated Mining Holdings* 1985 (1) SA 294 (C) where Vos J dealt with inadmissible evidence. Vos J says the following at 296:

> "The reply to these averments was that the respondent had no knowledge, but moved to strike them out as hearsay or not being the best evidence."

He then continues:

> "There was no admission of their correctness by the respondent, hence there was no question of accepting their correctness."

Again, the facts of that case were distinguishable from the present case.

In the present case the payment of the dividend is expressly admitted.

[23] Ever since the case of *R v Perkins* 1920 AD 307, it has been trite that in civil proceedings a party cannot object to answers which it has elicited under cross-examination. In such instances, the contested evidence becomes admissible. That is precisely what has happened in this particular case. In any event there is also the law of Evidence Amendment Act, No. 45 of 1988 which gives the court the power in certain circumstances to admit hearsay evidence.

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[24] If one has regard to the fact that there is a baldness of protestation about there being funds available, that the facts as to whether there are funds available or not is peculiarly within the knowledge of the first defendant, the fact that the second respondent has agreed to abide the decision of the court and has not protested that if the funds are, as sought by the applicant to be withdrawn, were to happen, it will be left exposed as a guarantor, one is tempted, on the basis of the law of Evidence Amendment Act 45 of 1988, to conclude that even if this evidence is hearsay it is nevertheless admissible. It is not necessary to go that far,
20 tempting that may be. I have also taken a precaution, which I have discussed with counsel, of insisting that the court order should expressly provide that there are to be no funds paid over to the applicant in the event that the necessary minimum in terms of the CTA agreement is not maintained.

[25] In all the circumstances, the applicant is entitled to succeed in terms of a draft which was prepared which fully reflects my intentions in this matter. I shall make an order in terms of a draft marked 'X'. For the sake of completeness I shall read this out into the record so that there is no risk in the event that (as so often happens in this court) the order goes missing, there will be any doubt as to what the court ordered. I also make it clear that once I have delivered (pronounced upon) the order, counsel are free to photocopy with my clerk copies of this order so that there is no room for any doubt as to what the intention of the court is.

[26] This is the draft order marked 'X':

1. Subject to 2 below:

1.1 It is declared that the applicant is entitled to withdraw against the proceeds standing to the credit of the banking account open and operated with the second respondent under account number – 1923-DC00H00034 and bearing the description – Kensani –security deposit ("the bank account").

1.2 The second respondent is directed to make payment to the applicant of the amount withdrawn as provided in 1.1 above within a period of seven days from the date of grant of this order or a written instruction from the applicant to the second respondent, whichever is the later.

2. The applicant's entitlement to withdraw from the bank account as provided for in 1.1 above and the second respondent's

obligation to make payment in terms of 1.2 above is subject to there being an entitlement for the guarantor to withdraw from the bank account such amount as will, taking into account the then required balance in the rectification account ("the rectification account") (i.e. as defined in Clause 1.2.14 of the corporate guarantee ANNEXURE "FA3" to the applicant's founding affidavit ("the corporate guarantee") ensure that the first respondent (as guarantor under the corporate guarantee) will maintain the value of the security deposit provided for in Clause 4.1 of the corporate guarantee, at all times equal to 50% of the difference between the then current balance in the rectification account, and the required balance thereof as contemplated in Clause 2.2 of the corporate guarantee.

3. The respondent is directed to pay the cost of this application. Such cost to include the cost occasioned by the employment of senior counsel.

That is the order in terms of the draft marked ‘X’.

Counsel for the applicant: Adv *A. Sube*l SC.

Counsel for the first respondent: Adv *P. B*. *Hodes* SC (with him, Adv *A* Moultrie).

No appearance for the second respondent.

Attorneys for the applicant: Fluxmans Incorporated.

Attorneys for the first respondent Coetzee van Rensburg Inc.

No appearance (no attorneys) for the second respondent.

Date of hearing: 26 November 2012.

Date of judgment: 28 November 2012.