IN SOUTH GAUTENG HIGH COURT

JOHANNESBURG CASE NO: 38843/12

DATE:22/02/2013

In the matter between

**ROYAL BAFOKENG NATION & OTHERS** APPLICANTS

and

**ABSA BANK LTD & OTHERS** RESPONDENTS

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**J U D G M E N T**

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**WILLIS J:**

[1] This is the return day of a so-called 'quasi-vindicatory' claim. My sister Mayat J on 6 December granted an interim order declaring that moneys held by the second respondent under '*Sanlam Investment Company 5096410*' at all material times, including at the time of the first respondent's purported appropriation thereof is and remains vested in the applicants.; that the first respondents shall pay to the applicants R15 050 000.00, being a sum equal to the sum purportedly appropriated by the first respondent from Sanlam Investment, and interest on the sum of R15 050 000.00 calculated at 15.5

percent per annum from the date of the purported appropriation, being 18 November 2011 and that te first respondent shall pay the applicant's cost in the application on an attorney and own client scale. They also sought an order that a copy of the rule shall be served on the first respondent within ten days from the date of this rule at the first respondent's chosen address for service, namely 7th Floor, Group Litigation, Absa Towers, West, 15 Troy Street, Johannesburg. Reference (Themba Ncubeni).

[2] As I have said, this is the return day of a 'quasi-vindicatory' claim. The purists have difficulty with the concept of a 'quasi-vindicatory" claim. I have some sympathy with that objection. You cannot 'sort of' have a and you cannot have a 'sort of' a right. You either have a right or you do not have it. Be that as it may the term has become a part of our legal lexicon and one has to deal with it as best one can.

[3] The only matter in which I had previously given a judgment in a quasi-vindicatory application was the case of *Joint Stock Co Varvarinskoye vs Absa Bank Limited* 2008 (4) SA 287 (SCA). In this matter I was upset on appeal. Interestingly, shortly after I was upset on appeal, I had the honour of being entertained at a luncheon hosted by five very senior counsel at the Johannesburg Bar, several of whom have international practices in London, Europe and in Hong Kong, who happened to say that I was right and the the Supreme Court of Appeal ('SCA') was wrong. That might be flattering to one's ego, but the law is as pronounced by the SCA..

[4] Perhaps it is precisely by reason of the fact that we have to do with a quasi-vindicatory claim is that we have much mumbo-jumbo, hocus-pocus, smoke-and-mirrors – even *abracadabra* before one. Initially, it was difficult to determine what exactly the nature of the claim might be. Be that as it may, the facts are relatively straight forward. The applicants claim payments of money which they allege is due to them, by reason of a joint venture agreement that they claim existed.

[5] On 1 October 2007 Charize Kailiam Singer Horwitz, Attorneys invoiced Anglo Platinum Management Services (Pty) Limited with the sum of R30 780.00.00. That invoice describes the claim as a long term rental amount together with associated costs to various trusts. Anglo Platinum Management Services (Pty) Limited held a board meeting on 30 July 2007 and resolved under a heading, 'Purchase of land for Tailingsdam Dam Extension', that the application for funds of R30 000.000.00 to acquire land for the Tailingsdam extension in respect of the "BRPM joint venture Steeldrift project B and is hereby approved."

[6] On 15 November 2007 the sum of R30 780 000.00 was deposited into the account of Kailiam Kathrada Attorney's trust account. Kailiam and Kathrada was the new name of the firm that had previously been known as Charize Kailiam Singer Horwitz. – i.e. Kailiam Kathrada later became the name under which Charize Kailiam and Singer Horwitz had previously operated.

[7] On 19 November R30 000.00.00 was transferred by Charize Kailiam

Singer Horwitz to Prudential Portfolio Managers South Africa (Pty) Limited ('Prudential'). Prudential is an A-rated black economic empowerment company which operates an institutional asset management business. It is an authorised Discretionary Financial Services Provider, duly licenced in terms of Section 8, read together with section 7 of the Financial Advisory and Intermediary Services Act, No. 3 of 2002. On 23 September 2008 these attorneys Kailiam Kathrada invested the sum of R30 780 000.00 with Sanlam Collective Investments under investor code 509641160.

[8] In October 2010 the fourth respondent, one Mpho Anthony Matchila, applied for an overdraft facility from the first respondent. He was, unsurprisingly, asked by the first respondent whether he could put up security therefor. The said that he could - the security would be funds held under Sanlam Collective Investments, the funds in question. This fact was confirmed by Kailiam Kathrada

[9] On the same day the first respondent and the fourth respondent agreed upon the terms of an overdraft agreement to be granted by the first respondent to the fourth respondent Kailiam and Kathrada, who are the third respondents in this matter, ceded all titled and interest in and to the Sanlam Collective Investment held under investor code 509641160 to the first respondent. The first respondent duly lent a sum of approximately R15 million to the fourth respondent on overdraft.

[10] Some time later it came to light that things were untoward and on 8

August 2011 Bowman Gillfillan wrote a letter to the bank informing it of irregularities that appear to relate to the transaction in question. The first respondent replied on 3 October 2012. The letter reads as follows:

> "The above matter and our e-mail dated 8 August 2011 refer. The above investment were ceded to us on 3 November 2010 as security for an overdraft for R30 million, furnished to M A Machila in the amount of R15 800.000.00. The bank holds the investment as security until such time as the overdraft facility has been paid in full. This letters serves as notice that we intend to call up the security forthwith."

[11] After an exchange of correspondence within Bowman Gilfillan and the first respondent following upon correspondence in which Kailiam and Kathrada, the third respondent, were also involved. The first respondent advised on 15 November 2011:

> "We confirm that our client, Mr Matchile, has defaulted on the agreement in that he has fail to repay the facility on the due date. We have therefore decided to immediately take steps to realize the abovementioned investment pledged to us as security."

[12] It is common cause that the first respondent did in fact call up the money ceded to it and that this was used in the liquidation of the overdraft of the fourth respondent. Interestingly, in this matter the second, third and fourth respondents have not opposed the relief sought.

[13] The first respondent has raised a number of difficulties with the applicant's claim. The first is that the right, title and interest of the applicants in the funds in question has been broadly and insufficiently set out. There is decisive merit in this point. On the papers before me the right, title and interest in the money was vested in Anglo Platinum Management Services (Pty) Limited. It is certainly not clear on the papers before me that the Royal Bafokeng Nation or Royal Bafokeng Resources (Pty) Limited or Rustenburg Platinum Mines Limited had any interest in these particular funds.

[14] Even if I am wrong in this regard and even if the application should not be dismissed on the basis that there is no apparent right, title and interest in the funds in question vesting in the applicants, there is a further difficulty and this is that, quite clearly, if one has regard to the facts and circumstances, the funds were not effectively 'earmarked' as belonging to any of the applicants in question. Here I have regard to the cases of *Standard Bank of South Africa Limited v Echo Petroleum CC* 2012 (5) SA 283 (SCA) at 287G and the case of *Absa Bank Limited v Intensive Air* (*Pty*) *Limited and Others* 2011 (2) SA 275 (SCA), especially at [22] where it is said.

> "Had the thief, however, deposited the stolen money into an account where it was still identifiable as the fruit of the misdeed the company would have had a quasi-vindicatory claim to it."

Certainly in this particular case there is no earmarking of that particular kind.

[15] I also have had regard to the cases of *First National Bank of Southern Africa Limited vs Perry N.O. and Others* 2001 (3) SA 960 (A) at paragraph [18] and *Nissan South Africa (Pty) Limited v Marnitz N.O. and Others* (*Stand 186 Aeroport* (Pty) *Limited Intervening*) 2005 (1) SA 441 (SCA). Where Striecher JA, delivering the unanimous judgment of the court said at pargraph [16]:

> "I agree with Thirion J that our law would be deficient if it did not provide a remedy for recovery of stolen money direct from the bank which receive that money to the credit of the thieve's account for as long as that money stands to the credit of the thief."

[16] "The thief" in this instance would have been either Machiela, the fourth respondent, or Kailiam and Kathrada Attorneys, the third respondent, or the two of them acting in concert together. It is quite clear, on the facts before me, that these funds do not stand to the credit of either of these two "thieves". There is no money standing to the credit of either Machiela or Kathrada and Attorney's in the account of the first respondent. This again in my respectful submission, presents the applicants with an insuperable difficulty.

[17] There are further difficulties. In the case of *V. S. Rajah & Co v Fann* 1976 (2) SA 351 (D) at 353 - 354 Didcott J (then a *puisne* judge in the Natal Provincial Division) referred with approval to the case *De Villiers N.O. v Kaplan* 1960 (4) SA 476 (C) at 478 E - 480 A where Van Winsen J (as he

then was) and De Villiers AJ affirmed the principle that moneys in attorney's trust account *quoad* the rest of the world are the attorneys to deal with it as it wishes. This principle has been affirmed recently by the SCA in the case of *Wypkema v Lubbe* 2007 (5) SA 138 (SCA) at paragraph [6]. In the *Wypkema vs Lubbe* case the SCA also referred unanimously with approval to the case of *Fuhri vs Geyser NO and Another* 1979 (1) SA 747 (N) at 749 C - E to what was said by Hefer J (as he then was). Hefer J also referred with approval to the judgment of *De Villiers NO vs Kaplin* to which I have referred earlier.

[18] I respectfully agree with Mr McNally when he submits that is the end of the matter: The first respondent, ABSA bank, when it dealt with the third respondent as attorneys was entitled to accept that the firm of attorneys was dealing with money at its disposal. First respondent could not be put to further enquiry. On this basis alone the first respondent should succeed.

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[19] There is a final point that needs to be considered and that was the point raised by Mr *Wasserman* that an invalid cession remains invalid and no amount of sophistry, legally or otherwise, can resurrect to life something that is invalid *ab initio*. The argument by Mr *Wasserman* that there was an invalid cession, this cession could never been resurrected and, accordingly therefore, the funds that the first respondent received should be refunded to the applicants.

[20] In the case of *Graf v Buechel* 2003 (4) SA 378 (SCA) it was unanimously

held that where a right is ceded with the object of securing a debt the cession is regarded as a pledge of the rights in question. The court reaffirmed Millman *NO vs Twiggs and Another* 1995 (3) SA 674 (A) at 676 H - J and the the cases therein quoted. No reason, commercial of otherwise, requires in a case such as the present that such a cession of all right title and interest in and to the Sanlam Collective Investment held under investor code 509641160 to the first respondent. should be dealt differently from a pledge of a movable. The court was dealing with a session *in securitatem debiti* as we are dealing with in this particular case.

[21] Moreover, if the cession was invalid then the payment of the funds in question to the first respondent would have been invalid. On this basis alone I would have difficulty in seeing how the applicants could successfully proceed against the first respondent. They should have proceeded against the third respondent because the funds should been treated as not having been ceded and therefore still under the third respondent's its control.

[22] Be that as it may, there is yet another basis on which I have difficulty with the argument on the 'invalidity of the cession' point. In the case of *Oceana Leasing Services (Pty) Limited v BG Motors (Pty) Limited* 1980 (3) SA 267 (W), Melamet J referring to the case of *Roos vs Ross & Co* 1917 CPD 303 at 306 - 307, and *Tyre and Motor Supply Company Limited v Leibrandt* 1926 CPD 421 at 425 - 426 indicated that the conduct of a party claiming possession of a movable that was subject to a lien could prevent it from exercising its vindicatory rights. (See 273C-274A.)

[23] In the present case the applicants acted in an entirely supine manner for some four years. This must count against them. In the case of *Tyre and Motor Supply Company Limited*, the court referred to the case of *United Building Society vs Smookler's Trustees* and *Galombick's Trustee*1906 TS 623 at 629. In the case of *United Building Society vs Smookler's Trustee* Bristowe J delivered, in my respectful opinion, a learned exposition of the law. He referred to the *Digest* (50,17, 206). He also referred to what he described as a well-known decision of the Supreme Court of Holland decided in 1582 cited as Van Nieustad en Kooren, *Vonnis 35*, Gail's *Observatiën*, book two, obs.12, the Register of Nassau La Leck, p324 register, *Johannes Voet*, 20,1,4 and Kersteman's *Woordenboek*, sub voce *Retentie* in coming to the conclusion that a person who had a quiet possession of a good *bona fide* had a right to retain possession to avoid it being out of pocket, even against the true owner thereof.

[23] In the case of *Roos vs Ross* (at p306) the learned judge, Juta JP makes a distinction between the *jus pignoris* and the *contractus pignoris.* He refers to various actions which might arise, actions to which he refers as *pignoratitia directa et contraria*. The gist of this is that, although the owner was not a party to the pledge, the *bona fide* receiver of goods may have a right against the world to insist on retention until such time as the fact that it is out of pocket as been remedy. On this basis, although the first respondent could be open to criticism for proceeding to call up this particular cession in the discharge of the debt, it would certainly be entitled to refuse to pay over

the money until such time as its prejudice had been cured.

[24] In summary therefore, there are the following bases upon which the application stands to be dismissed

1) The lineage or pedigree of the funds in question is baldly set out and it is not clear that the applicants had any right at all in the funds in question.
2) There is no evidence satisfactory before the court that the funds in question were 'earmarked' as those belonging to any of the applicants.
3) The cession by the third respondents as the attorneys Kailiam and Kathrada is on the basis of clear authority valid as against (*quoad*) the world (which will include the first respondent).
4) Even if the cession was invalid, the first respondent would have a right at common law to insist on retaining its rights that arise there from until such time as any prejudice to it had been cured.
5) If this cession was invalid then the payment to the bank would have been invalid and it would be seem that the claim lies against the third respondent.

It needs to be emphasised that the first respondent acted *bona fide* (on the papers before me) and was entirely innocent of any wrongdoing. It also needs to be emphasised on the facts before me that there was nothing to alert the first respondent to the fact that anything might amiss, that it might have been put on enquiry. The reason why I am emphasise this is that I fully accept that the first applicant is, in many respects ,the darling of the financial

press repeatedly receiving applause for its sensible approach to joint venture capitalism. I also need to acknowledge that the status of the banks has changed somewhat, especially since 2008, and there is lurking in the minds of many people an attitude of 'The big, bad banks'. Against this background it really is important that the *bona fides* of the first respondent need to be emphasised.

[25] I also which to emphasise that there is nothing whatsoever to prevent the applicants proceeding against the other respondents or even the first respondent by way of an action. In other words the judgment that I will give will not be *res judicata* as to the whole issue of whether or not funds should be paid over to any of the applicants.

[26] This is an important matter. It is a big case. It involves complex issues of law. R15 million, even today is a large sum of money. Both sides had two counsel. The costs of two counsel are certainly justified.

[27] The following is the order of the court:

1) The rule *nisi* of 6 December 2012 is discharged.

2) The application is dismissed with costs, which costs are to include the costs of two counsel.

Counsel for the Applicants: Adv J.*D. Wasserman* SC

(Adv. T. *Van der Walt*)

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| Attorneys for the Applicants: | Bowman Gilfillan Inc. |
| Counsel for the Respondents: | Adv P. *McNally* SC |
| | (Adv. *A. Lamplough*) |
| Attorneys for the Respondents: | Edward Nathan Sonnenbergs Inc. |