REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO.: 2013/12867

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED

…… ……
DATE SIGNATURE

In the matter of:

PAUL DREYER **Applicant**

And

ERROL GOSS **First Respondent**

BLADE V (PTY) LIMITED **Second Respondent**
(in Liquidation)

JUDGMENT

GAIBIE, AJ

[1] The first respondent is Errol Goss (Goss), a practising attorney in Johannesburg. Paul Dreyer, the applicant (Dreyer), was his client. Goss received monies in trust from a third party, Plasquip (Pty) Ltd (Plasquip), for Dreyer pursuant to an agreement of sale. The issue in this matter is whether Goss can withhold payment to Dreyer of the monies in his trust account. There is no dispute between them, that the monies

in his trust account were received by him for Dreyer and that he continues to hold it on Dreyer's behalf. The dispute is about whether Goss should or should not release the monies to Dreyer in light of the fact that there may be 'potential' or competing claims for the money from one Emilio Ganhao (Ganhao) and the second respondent Blade V (Pty) Ltd (the Company), an entity in which Dreyer and Ganhao were co-directors and equal shareholders. (I refer to the individuals who feature in this narrative by their surnames for convenience).

[2] The relevant facts giving rise to this application can be succinctly summarised as follows:

a) According to Dreyer, during September 2009 the Company was unable to pay for equipment that it had purchased from Plasquip for an amount of R1,8 million. In the circumstances, he agreed to purchase it provided that[1]: 1) he acquired 50% of the share capital of the Company; and 2) ownership in the equipment vested in him until the R1,8 million had been repaid to him. The monies had not been repaid to him.

b) In any event, Dreyer and Ganhao became co-directors and equal shareholders of the Company. The relationship between Dreyer and Ganhao soured over time. That coupled with their business woes culminated in a special resolution for the voluntary winding up of the company which was passed on 29 March 2011 and registered on 7 April 2011.

c) Thereafter two significant events occurred. Dreyer concluded: a settlement agreement with an entity known as GK Mills (Pty) Ltd (GK Mills); and an agreement of sale (sale agreement) with Plasquip. The sale agreement ('the first event') preceded the settlement agreement ('the second event'). It is however more convenient to deal with the settlement agreement first and then the sale agreement to achieve a harmonious flow of events. During May 2011, GK Mills instituted action against the Company and Dreyer (in his capacity as surety for the Company) for monies owing for arrear rentals and other charges emanating from a lease agreement[2]. Upon receipt of the pleadings, Dreyer sought the services of his attorney, Goss. Presumably on Goss' advice, Dreyer entered into a settlement agreement with GK Mills on or about 7 September 2011. In terms of that agreement, Dreyer agreed to settle

[1] Paras 8 – 9 pg 7 FA
[2] Para 10 pg 8 FA

the Company's indebtedness to GK Mills in the amount of R450 000 and the latter agreed to release him of all of his surety obligations in respect of the lease agreement. As part of the settlement, GK Mills also released into Dreyer's custody seven machines that were situated on the leased premises which included: 4 blow moulding machines [WL MPO2; WL MPO2; WL MPO2 (dynamic brands-eezipak); and Kenplas 4 cavity (including conveying system)] and 3 high pressure compressors.

d) In order to raise the amount of R450 000 to comply with his obligations under the settlement agreement, Dreyer entered into a sale agreement with Plasquip on 6 September 2011, a day before the settlement agreement was concluded. In terms of that agreement, Dreyer sold to Plasquip the machines that would be released into his custody by GK Mills as well as five additional machines (indicated as 'injection machines' in the sale agreement) for the sum of R1 100 000 ('the purchase price'). In terms of the sale agreement, and specifically clauses 1 and 2 thereof, Plasquip agreed that it would prior to the delivery of the machines, deposit the full purchase price into the Goss' trust account, and upon delivery of the equipment to Plasquip, the latter would authorise Goss to pay the moneys to Dreyer. Delivery occurred at the point at which the machinery was loaded onto Plasquip's trucks and prior to the departure of the trucks from the premises where they were situated. Plasquip complied with its obligations. On 6 September 2011, it paid the purchase price into Goss' trust account, and on 7 September 2011 after it had taken delivery of the machines, it no longer laid any claim to the monies paid over to Goss, and duly instructed Goss to release the monies to Dreyer. Goss was aware of this arrangement, as he drew up both the settlement and the sale agreements.

e) On 7 September 2011, Dreyer instructed Goss to transfer the amount of R470 000 to GK Mills to comply with his obligations in respect of the settlement agreement. Goss did so and at that point the amount of R630 000 was left in his trust account. From that point onwards, and despite demand, Goss refused to pay the balance of the trust monies to Dreyer, mainly on the basis that there may be 'potential claims' for such monies. But Goss was quite confused about who the claimant would be or indeed who the claim would be against. His version about these aspects underwent various mutations. During 2011, when he was rendering legal services to Dreyer in relation to the settlement and the sale agreements, Goss was of the view that Dreyer's intention to settle the debt owed to GK Mills with the proceeds of the sale of equipment '*was problematic since <u>he</u> would be utilising funds that rightly belonged to*

Ganhao in terms of the written deed of cession in order to secure <u>his personal release</u> under the terms of the written suretyship'[3]. At this stage, Goss was of the view that Dreyer was inadvertently placing himself, rather than Goss' firm, at risk by selling the equipment and using the proceeds thereof for the settlement of his debt to GK Mills. That is why he promptly carried out Dreyer's instructions to transfer the amount of R450 000 from his trust account to GK Mills in terms of the settlement agreement.

f) Approximately one year later, Goss had a different view about who the potential claimants would be, and he steered away from articulating precisely why his firm, rather than Dreyer would be at risk in respect of such claims. The change in his attitude was captured in a letter that he had sent to Dreyer on 5 October 2012:

> 'We have taken advice on the potential claims for entitlement to the trust monies by the liquidator of Blade V (Pty) Ltd .... yourself and/or Mr Ganhao.
>
> We have a well grounded apprehension that our firm is <u>under potential liability and it may be sued for payment over the monies</u> held by any one or more of the parties mentioned. The advice received confirms the well grounded apprehension.
>
> ..... we proceed to commence interpleader proceedings with the object of obtaining an order of court regarding which of the abovementioned parties is entitled to the monies held. The papers will be served on the relevant parties shortly'[4]. (my emphasis)

g) In essence therefore, and as at that date, Goss had refused to effect payment of the *balance of the trust monies* to Dreyer on the basis that there may be a claim against his firm in respect of this money by third parties, such as, Ganhao and the Company.

h) And even though Goss repeatedly made the assertion that there may be competing claims against his firm for such monies, no such claim has been received by his firm for more than three years. In any event, and to the extent that he suggests that he has a 'well grounded apprehension' that his firm may be '*under the potential liability and it may be sued for payment over the monies*' if he releases the monies to Dreyer, he does not articulate the legal basis on which he makes that assertion in his correspondence with Dreyer or in his answering affidavit in this matter. Perhaps

[3] Para 12 page 34 of the Answering Affidavit
[4] Page 18 FA

more significantly, although Goss repeatedly indicated his intention to launch interpleader proceedings in respect of such monies, he did not do so until 24 October 2014, which was three days before the hearing of this matter, and more than three years from the date on which he has held the monies in trust. If Goss had simply stood back, caught his breadth and thought about the facts in this matter, he would have realised that his legal duty emanated solely from his relationship with Dreyer, and that if there were any other competing claims they would have existed amongst and between Dreyer, Ganhao and the liquidators of the Company.

i) Approximately three months later, Goss had yet another view about who was entitled to the balance of the monies in his trust account. In a letter dated 11 December 2012, Goss wrote to Dreyer's newly appointed attorneys, Fluxmans Attorneys. He took a decisive but unexplained view as to who owned the property that was the subject of the sale agreement, and he once again indicated that he intended to launch inter-pleader proceedings in respect of this matter. The relevant part of the letter reads as follows:

> 'The machinery purchased by Plasquip (Pty) Ltd was the property of Blade V (Pty) Ltd.
>
> Mr van der Westhuizen of Tutor Trust, the liquidator of Blade V (Pty) Ltd has advised us that they intend laying a claim to the monies in our trust account and Mr Crouse of Crouse Incorporated has requested us to serve the inter-pleader application on their offices[5].
>
> Kindly advise whether you are authorised to accept service of the inter pleader application.'[6]

[3] In the absence of any interpleader proceedings being instituted by Goss, Dreyer instituted this application during April 2013. Despite these proceedings, Goss has persistently refused to comply with Dreyer's instructions in respect of the balance of the monies in his trust account. The jurisprudence developed by our courts in respect of an attorney's duty in relation to monies held by him in trust are clear. In

[5] See letter from Crouse Inc dated 29 Oct 2012.
[6] Pg 22

Areoquip SA v Gross & others[7], Southwood J cited with approval the following dictum in Law Society, Transvaal v Matthews[8]:

> "I deal now with the duty of an attorney in regard to trust money. Section 78(1) of the Attorneys Act obliges an attorney to maintain a separate trust account and to deposit therein money held or received by him on account of any person. Where trust money is paid to an attorney it is his duty to keep it in his possession and to use it for no other purpose than that of the trust. It is inherent in such a trust that the attorney should at all times have available liquid funds in an equivalent amount. The very essence of a trust is the absence of risk. It is imperative that trust money in the possession of an attorney should be available to his client the instant it becomes payable. Trust money is generally payable before and not after demand."

[4] In Aeroquip[9], Southwood J also stated that an attorney does not become personally liable for the payment of a debt where he fails to pay over to a client's creditor an amount held by him on behalf of his client in his trust account. In this regard he stated that –

> "The applicant has not referred to any authority that an attorney becomes personally liable for payment of a debt where he fails to pay over to a client's creditor an amount held by him in trust. The contrary appears to be true. An attorney who holds an amount of money in his trust account on behalf of a client is obliged to use it for no other purpose than he is instructed by the client. It is trite that it must always be available to the client."

[5] In adopting an attitude in contravention of these legal principles, Goss was confused about his duty to Dreyer on the one hand, and the mistaken impression of his duty towards third parties such as Ganhao or the Company. Even if one were to assume that Ganhao or the Company had unimpeachable claims against Dreyer either on the basis of a cession of equipment to Ganhao, or on the basis of the law of insolvency in respect of the Company or its liquidators, they would have no legal entitlement to the monies in the trust account and their claims would be against Dreyer, and not Goss.

[6] At the hearing of this matter, I was informed by the counsel for Dreyer and the Company that they had reached an agreement in terms of which the monies held in trust by Goss (on behalf of Dreyer) should be paid over to the Company. On behalf

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[7] [2009] 3 All SA 264 (GNP) at 273
[8] 1989 (4) SA 389 (T) at 394
[9] See fn 7 at para 13 pgs 272 - 273

of the Company it was submitted that in consequence of its winding up process, Dreyer and Ganhao completed annexure CM100 to its 'statement of affairs' which is a reflection of a full statement of its assets and liabilities as at the date of winding up, which preceded both the settlement and sale agreements. It appears therefrom, and particularly annexure 'C' thereto, that the Company owns assets and liabilities in the form of machinery to the value of R900 000 without specifying the details thereof, and that Dreyer's loan account in the amount of R1.8 million rands is reflected as an unsecured loan. In the circumstances, it was contended, that the machinery that was sold to Plasquip in fact vested in the insolvent estate and that the proceeds of the sale thereof rightfully belongs to that estate[10]. It was, presumably, in this context that Dreyer reached agreement with the Company that the balance of the monies held in trust should be paid over to the Company. That seems to me to have been the honourable thing to do.

[7] There is however one last issue that warrants consideration. In addition to the various mutations of Goss' reasoning as to why he has consistently refused to release the monies in trust to Dreyer, his counsel relied on the decision of the Supreme Court of Appeal (SCA) in *Nissan v Marnitz*[11] at the hearing of this matter for the proposition that Dreyer is in much the same position as the holder of a bank account who is mistakenly credited with monies. In that regard the SCA held the following in paragraphs 23 and 25 of the judgment:

> '..... If stolen money is paid into a bank account to the credit of the thief the thief has as little entitlement to the credit representing the money so paid into the bank account as he would have had in respect of the actual notes and coins paid into the bank account.'

And

> 'The position can be no different where A, instead of paying by cheque, deposits the amount into the bank account of B. Just as B is not entitled to claim entitlement to be credited with the proceeds of a cheque mistakenly handed to him, he is not entitled to claim entitlement to a credit because of an amount mistakenly transferred to his bank account. Should he appropriate the amount so transferred, ie should he withdraw the amount so credited, not to repay it to the transferor but to use it for his own purposes, well knowing that it is not due to him, he is equally guilty of theft.'

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[10] See in particular section 83(1) of the Insolvency Act 24 of 1936 which sets out the basis upon which security for any claim may be realised by a creditor.

[11] 2005 (1) 441 (SCA). This decision was previously relied upon by the Company in its heads of argument.

[8] Reliance by Goss on this case is in my view misplaced. That case dealt with an account holder's right to monies mistakenly transferred into an account. It was never contended by Goss that the monies were mistakenly transferred into his trust for Dreyer, or that the monies represent the proceeds of theft, because if he had so contended he would have been complicit in those arrangements. In any event, and to the extent that Dreyer is not entitled to the monies in Goss' trust account, he has now reached an agreement with the liquidators of the Company in that regard, an agreement that Goss should have embraced. Instead, he persisted with his view to retain the monies presumably until the interpleader proceedings (launched in another court) has run its course, an approach that has generated unnecessary litigation (in both courts) at great cost to the other parties.

[9] For completeness it is necessary to record, that I was advised at the hearing of this matter that the amount in Goss's trust account was R716 322,59 as at 1 October 2014.

Based on the draft order provided to me by counsel acting for the applicant and the Company, it is ordered as follows –

(1) The first respondent is ordered and directed to pay to the second respondent the sum of R716 322,59 together with interest at the rate of 9% per annum from 1 October 2014 to date of payment.

(2) The first respondent is ordered and directed to pay the applicant's costs of this application, including the cost of senior counsel.

(3) The first respondent is ordered and directed to pay the second respondent's costs of this application occasioned subsequent to 14 March 2014 including the cost of counsel.

Appearances:

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Date of Hearing: 27 October 2014

Date of Judgment: 27 November 2014