REPUBLIC OF SOUTH AFRICA

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

CASE N0: A136/2019

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

....
DATE SIGNATURE

In the matter between:

COMMUNICATION SPECIALISTS APPELLANT

and

LINDA JOSEPH NYEMBE FIRST RESPONDENT
COMSCIENCE (PTY) LTD SECOND RESPONDENT

LEGAL SUMMARY

MAKUME J:

Company law – Fraudulent Misrepresentation – Resolution void ab initio. Payment made without just cause and against the law.

The directors of the appellant purported to take a resolution to pay a sum of money to the first respondent. The transaction was justified as dividends for his shareholding. On trial it was proved that the first respondent did not have shares in the appellant. The resolution was a sham and a fraudulent misrepresentation with a sole purpose to defraud the appellant.

The first respondent was among the directors who took the resolution which benefited him. He did not declare his interest in the meeting that took the resolution. This was against the law and or his fiduciary duties. This decision was also not ratified in order to bring it in line with the law as required by the companies Act.

Consequently, on appeal the resolution was found to be void ab initio. The first respondent was ordered to pay the money received in terms of that resolution to the appellant. The appeal was upheld.

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG
CASE NO *a quo* 30354/2019
APPEAL CASE NO: A136/2019

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

10/11/2021
DATE

SIGNATURE

In the matter between:

COMMUNICATION SPECIALISTS (PTY) LTD **APPELLANT**

And

LINDA JOSEPH NYEMBE **FIRST RESPONDENT**

COMSCIENCE (PTY) LTD **SECOND RESPONDENT**

JUDGMENT

MAKUME J:

[1] The Appellant who was the Applicant in the court *a quo* sought an order nullifying the resolution of its Board taken during May 2014 which resolution resulted in the Appellant making a payment of R1 736 285.70 to the first Respondent.

[2] The court *a quo* per Ellis AJ found that the Appellant had failed to prove that the resolution of its Brand adopted on the 29th May 2014 was as a result of the fraud and taken with the sole intention to unlawfully pay the first Respondent the said amount of R1 736 285.70.

[3] It is that judgment and order that is being appealed against. The role players in this matter leading up to the adoption of the impugned resolution are the following:

i) Mr Shawn Boshoff

ii) Mr Joseph Linda Nyembe (1st Respondent)

iii) Comscience (Pty) Ltd (2nd Respondent)

[4] It is common cause that the Bushveld Trust held 70% (seventy percent) share in Comscience (Pty) Ltd (the 2nd Respondent) and that LJ Nyembe the first Respondent held 30% thereof.

[5] On the 14th January 2014 the first Respondent and Mr Shawn Boshoff who had no authority from the Bushveld Trust purported to enter into an oral agreement in which agreement they sought to instruct the shareholders in Comscience (the 2nd Respondent to reflect that first Respondent now held 51% and the Bushveld Trust 49% shareholding in Comscience.

[6] That oral discussion between Shawn Boshoff and the first Respondent was reduced into writing and forms the basis of the impugned resolution of the 29th May 2014. Neither Shawn Boshoff nor the first Respondent produced proof that Shawn Boshoff had the necessary authority to Act for and on behalf of the Bushveld Trust.

[7] Acting on that oral discussing the board of the Appellant then chaired by one Dr Stephen A. Grech passed a resolution to pay to the first Respondent an amount of R1 736 288.70 on the basis that this was an amount representing dividend received by the Appellant from the second Respondent and accordingly that the Appellant had received such payment for and on behalf of Linda Nyembe the first Respondent. The payment was then made to the first Respondent on the 29th May 2014.

[8] When this resolution was passed and payment made to the first Respondent the board of directors of the Appellant were Dr Stephen A Grech, Mr Warwick Leaks and L.J. Nyembe (the 1st Respondent). The same people were also the directors of Comscience the second Respondent.

[9] On the 2nd September 2014 under case number 4118/2018 Bushveld Trust instituted an urgent application against the first Respondent and were granted an order by Madam Justice Keightley AJ as she then was in the following terms:

"(i) Directing that the Bushveld Trust is a 70% shareholder of the shares in Comscience (Pty) Ltd

(ii) That the first Respondent (Linda Nyembe) is a 30% shareholder of the shares in Comscience (Pty) Ltd

[10] The order by Keightley AJ still stands and has not been overturned. The effect of the order is that the purported agreement concluded in January 2014 as well as the resolution passed on the 29th May 2014 became null and void *ab initio*. Accordingly the status quo ante became effective.

[11] In paragraph 16 of its founding affidavit the Appellant says firstly that the fictitious agreement was fraudulent and improper and secondly that it was invented and conceived by the then board of directors of the second Respondent who at the time where also directors of the Appellant.

[12] It is clear that the Appellant's case is based on two grounds, firstly fraud perpetrated by Boshoff and Nyembe, secondly failure by Nyembe who was a director in both companies to declare his interest in contravention of Section 75 and 76 of the Company's Act 2008.

[13] The resolution of this matter in my view rests on the proper interpretation of Section 76 of the Company's Act 2008. The question

to be asked is when the director of the Appellant sat and passed the resolution on the 29th May 2014 whether their conduct met all the requirements of the Section of the Company's Act stated above.

[14] Section 75 (7) of the Company's Act states that a decision by a board, or a transaction or agreement approved by a board as contemplated in Subsection (3) is valid despite any personal financial interest of a director or person related to a director only if it was approved following disclosure of that interest in the manner contemplated in this Section.

[15] Section 76(2) of the Company's Act reads that a director of a company must:

a) not use the position of director or any information obtained while acting in the capacity of a director, or

b) to gain an advantage from the director

[16] Section 76(2) *coditiei* the Common Law fiduciary duty to prevent a conflicting interest between those of a director as a director and those of the company. Hennochsberg on the Company's Act 71 of 2008 at Vol1 page 292 – 293 writes as follows:

"*The Common Law provides that duties which flow from this duty not to have conflicting interests are:*

i) the duty to disclose any interests in a contract with the company.

ii) the duty to account for secret profits.

iii) the duty not to misappropriate corporate opportunities.

iv) the duty not to improperly to complete with the company.

Section 75 is clearly in line with the duty to disclose any personal financial interest."

[17] In the matter of **Lindiwe Mthimunye Bakoro vs The Petroleum Oil and Gas Corporation of South Africa Ltd And Another Case No 17476/2016** (Western Cape High Court) dated 4th August 2011 Davis J reasoned that under Common Law a director may not place himself or herself in a position in which she or he has or can have a personal interest which conflicts or possibly conflicts with his or her duties to the company.

[18] The facts in this matter are that on both the 14th January 2014 as well as the 29th May 2014 the first Respondent had a fiduciary duty to the Appellant which fiduciary duty amongst others include the financial stability of the Appellant yet he participated in a decision to benefit himself under circumstances which could not be supported by credible evidence.

[19] The amount paid to first Respondent did not as averred by him constitute dividend received by the Appellant for and on behalf of first Respondent. There is ample evidence that the money belonged to Appellant. Nyembe the first Respondent was never a shareholder in Comspec and there never existed any legal basis for payment of the said amount. That resolution of the 29th May 2014 was taken unlawfully and with fraudulent intent.

[20] Innes CJ in dealing with the test regarding conflict of interest in the matter of **Robinson vs Ranfontein Estate Gold Mining Co Ltd 1925 AD 168 at 178-19** said the following:

> *"Conflict of interest rests upon the broad doctrine that a man who stands in a position of trust towards another cannot in matters affected by that position, advance his own interest (e.g. by making a profit) at the others expense."*

[21] Lord Herschle in **Brady v Ford [1896] AC 44 at 51** captured this concept in the following words:

> *"human nature being what it is, there is a danger, in such circumstances of the person holding a fiduciary position being swayed by interest rather than duty and thus prejudicing those he is bound to protect."*

[22] The court a quo erred in not finding that the resolution dated the 29th May 2014 fell foul of the provisions of Section 75 and 76 of the Company's Act.

[23] Section 75(5)(a) calls upon a director to disclose any interest he or she has in a matter to be discussed by the board. Failure to do so renders any resolution taken in the presence of that director invalid unless it is subsequently ratified by an ordinary resolution of the shareholder (Section 75(7) (b) (i)) or validated by the court in terms of Section 75(8).

[24] The resolution taken by the board of the Appellant on the 29th May 2014 is accordingly invalid. No attempt was made by first Respondent to ratify it. That invalidity entitles Appellant to restitution as claimed.

[25] The court *a quo* gravely erred when it applied Section 37(5)(c) of the Company's Act in justifying non-compliance with the provisions of Section 75. Firstly, this was never pleaded by Nyembe the first Respondent. Secondly Section 37 is not applicable in this matter it deals with preference rights and not the entitlement by shareholders for distribution of dividends provided this is catered for in the Company's memorandum of Incorporation. The court did not refer to any such provision in the memorandum of Incorporation of the Appellant.

[26] The first Respondent LJ Nyembe was not entitled to receive the amount of R1 736 788.70 from the Appellant and he must accordingly repay it.

[27] Contrary to what the Appellant's case was the court *a quo* conflated the issue between the Appellant's case which was based on fraud and sought to assign to it the concept of unjust enrichment and thus misdirected itself. The Appellant's case is not and was never based on unjust enrichment it has always been that the first Respondent and Shawn Boshoff contrived a scheme to defraud the Appellant and they succeeded in doing that.

[28] A claim based on fraud is delictual in nature and not one based on unjust enrichment. The court in **Yarona Healthcare Network (Pty) Ltd vs Medshield Medical Scheme 2018 (1) SA 513 (SCA) at paragraph 48** explained the consequences of a claim based on unjust enrichment as follows:

> *"[48] It is as well to begin by emphasising that Medshield's claim was not a claim for restitution in integrum. That is a special remedy accorded by our law where voidable contracts are rescinded on certain recognised grounds. A party seeking rescission and restitution in integrum must accordingly be willing and able to restore what he has received and should tender such restoration when claiming. Restitution in integrum does*

not find application in a case such as the present where no contract case into existence. Medshield's claim was thus correctly the Conditio indebiti. In Davidson v Bonafele, Marais J with approval to Prof De Vos' warned against the tendency to confuse restitution in integrum, which is not an action with the conditiones."

[29] In **Ruto Flour Mills (Pty) Ltd v Moriates 1957 (3) SA 113 (T)** it was held that if reliance is placed on fraud a party must amongst others allege misrepresentation made by the defendant with the knowledge that same was false and which induced the Plaintiff so to act.

[30] A party relying on unjust enrichment has to allege amongst others that the defendant was enriched and the Plaintiff impoverished (See **McCathy Retail Ltd vs Short distance Carriers CC 2001 (4) SA 132 (SCA)**). These are not essential allegations in a claim based on fraud.

[31] I am satisfied that the Appellant proved fraud perpetrated by the first Respondent and therefore the Appellant became entitled to repayment of the amount as claimed in its prayer. The Appellant did not have to prove unjustified enrichment its case was not based on that.

[32] In the result this appeal must succeed and I propose that the following order be made:

ORDER

1. The appeal is upheld with costs.

2. The judgment of the court a quo dated the 4th July 2018 is hereby set aside and, in its place, the following order is made:

   a) The Applicant's resolution dated the 29th May 2014 is declared null and void *ab initio* and is hereby set aside.

   b) The first Respondent is ordered to forthwith repay the Applicant the amount of R1 736 285.70.

   c) The first Respondent is directed to pay the costs of the application.

DATED at JOHANNESBURG this the day of DECEMBER 2020.

MAKUME J

I agree.

MOLAHLEHI J

I agree.

MADIBA AJ

DATE OF HEARING	:	05 AUGUST 2020
DATE OF JUDGMENT	:	10 NOVEMBER 2021
FOR APPLICANT	:	ADV D.B. DU PREEZ SC
INSTRUCTED BY	:	MACROBERT INC
FIRST RESPONDENT	:	ADV P.L. LOURENCE
INSTRUCTED BY	:	GOODES & SEEDAT INC