IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT)
FULL BENCH

Case Number: A836/2010

1/8/2012

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED.

DATE 1/8/12 SIGNATURE

In the matter between:

ANDRè STEPHANUS VISSER	**APPELLANT**
and	
JOHAN DANIëL DE VILLIERS	**FIRST RESPONDENT**
ANGELIQUE DE VILLIERS	**SECOND RESPONDENT**
X-PRESS NET – INLAND (PTY) LTDQ	**THIRD RESPONDENT**

JUDGMENT

Fabricius J.

1.

This is an appeal against the order made by the court *a quo* in terms of which the Appellant was ordered to pay to the First and Second Respondents an amount of R1, 000 000 together with interest calculated thereon at the rate of 15.5% p.a. from 10 March 2008 until the date of payment of the said amount. A

cost order was also made and the Registrar of this court was directed to forward a copy of the affidavits and Judgment to the Director of Public Prosecution. Leave to Appeal was refused but was ultimately granted by the Supreme Court of Appeal.

2.

First and Second Respondents are married, First Respondent is a business man and Second Respondent an attorney. Appellant is also a business man and was the sole director of the Third Respondent. In the motion proceedings the Respondents herein sought payment of the mentioned amount. The relevant facts were that the Respondents entered into a written agreement with the Third Respondent in terms of which they bought a property after they had been introduced thereto by an estate agent Mr B. Gerardy. He informed them that the purchase price was R2,100 000 and that the mentioned amount of R1,000 000 would have to be paid into the bond account which the Third Respondent had over the property. This meant that the particular financial institution in whose favour a bond was registered over the said property had to be paid this amount. The present Respondents had no difficulty with that, and accordingly entered into the relevant written agreement. In terms of this agreement the mentioned amount had to be paid to the seller directly, as they put it in the founding affidavit, in other words, into the bond account of the Third Respondent, whilst the balance had to be paid to the conveyancer, and to be dealt with on registration of the property. They alleged that pursuant to entering into the agreement, the Appellant herein provided the said Mr. Gerardy with the details of the bank account into which the R1, 000 000 had to be paid. They

alleged that the Appellant. when providing the relevant account details to Mr. Gerardy, specifically informed him that that was the bond account of the present Third Respondent. Mr. Gerardy confirmed this allegation in a supporting affidavit. This allegation was denied by the Appellant herein, who alleged that a certain Thomas had in fact represented the Third Respondent herein, and did all the relevant negotiations. However, the said Thomas made no affidavit supporting the Appellant. First and Second Respondents accordingly made payment of this amount with the name of the beneficiary being indicated to be the Third Respondent, namely the company. They say that Mr. Gerardy and they themselves, at all relevant times believed that the account number given to them was in the name of the Third Respondent i.e. its bond account. None of them thought or even suspected that the account provided to them was in fact the personal money market account of the Appellant. It later then transpired that the Appellant did nothing to sign the relevant documentation to enable transfer of the property to take place into their name, and accordingly they sought an order in the Witwaters rand Local Division of this court, which compelled the Appellant to sign the necessary documentation. Such order was granted. Not withstanding this order the Appellant did not sign the necessary documentation, and the Sheriff of the court accordingly did so. Thereafter it became evident to them that the account number which have been given to them was in fact not the bond account of the Third Respondent, but was the personal bank account of the Appellant. They had not known that. The bond holder also then indicated that it would not cancel the relevant bond prior to the full amount in respect of such bond being paid and settled. They accordingly alleged in the founding affidavit that

Appellant had lied to them, and had committed a fraud inasmuch as he has provided his own bank account into which payment was then made. They however also continued to allege in the founding affidavit that the payment to Appellant was a payment made in error, that it was not owing to Appellant at all inasmuch as they had no agreement with him, and that he was therefore not entitled to the receipt of that amount, and accordingly Appellant had been unjustly enriched at their expense.

3.

They also stated that the launching of the mentioned application was not to be construed as exercising any election on their part except insofar as they alleged that they were entitled to repayment of the said amount.

4.

It is therefore clear from the founding affidavit that on the one hand the First and Second Respondents alleged that the Appellant had committed a fraud upon them, and on the other hand, had also been unjustly enriched at their expense. The claim was therefore based on two legs i.e. the one being an intentional misrepresentation, and the other one based on unjust enrichment.

5.

As I have said, the court *a quo* granted the relief sought and rejected the version of the Appellant which related to the involvement of the said Thomas, and his assertion that because he was the sole director of the present Third Respondent, he had been entitled to receive the money and to spend it. In

that same context he also alleged that the Third Respondent herein had no banking account into which to deposit the funds, and it was for that reason that he had furnished the said Thomas with details of his private money market banking account. However, prior to that he had also alleged that the Third Respondent had been part of a group of companies in which he had purchased shares in, and that such group had wide spread business interests. Apart from that of course it would be extremely strange that the Third Respondent would not have had a bank account whilst a substantial bond was over the relevant property which presumably had to be serviced. In that context nevertheless the Appellant stated that there had been no restriction placed upon him to deal with the moneys paid, and that he was fully entitled to deal with them as he did. It is again strange, to say the least, that more then R800 000 of the mentioned deposit was spent on his personal whims, and certainly not on behalf of the Third Respondent or the so called group of companies in which he had an interest.

6.

In the replying affidavit the Respondents say that it was Appellant who had provided the said Mr. Gerardy with details of the bank account, that it had been represented to him that such account was the bond account of the Third Respondent, and that they were at no stage informed that this account had been the personal account of Appellant. If they had known that they certainly would not have made the payment. Appellant obviously knew that there was a bond over the relevant property and that the amount owing to the bank would have to be settled prior to any transfer. Furthermore, they alleged that certain

details of the account given to them had been inserted by Appellant after only the account number had been supplied to Mr. Gerardy. They had therefore not been aware that payment was made into any money market account, and even less into an account of Appellant himself. These allegations, as I have said, were confirmed by Mr. Gerardy. Second Respondent is an Attorney as I have said, and, as she stated, it would have been extremely unlikely that she would have made any payment to Appellant personally in the relevant context.

7.

The court *a quo* rejected the version of Appellant, and based its judgment and order on the basis that Appellant had been guilty of an intentional misrepresentation in the said context, and had therefore committed a fraud upon the First and Second Respondents. He did not deal in the judgment with the *condictio indebiti*, but did make reference there to when he refused the application for leave to appeal.

8.

In that context I may say that it is trite law that an appeal lies against the order made by a court and not merely against the reasons for its order. ***See Manana vs King Sabata Dalindyebo Municipality [2011] 3 All SA 140 at 142 par 3.***

9.

During argument Mr. Coetzee SC on behalf of Appellant submitted that all parties had intended that payment would be made to the company, Third Respondent, and that such payment had in fact been made. Respondents'

counsel pointed out that there had been no agreement between the mentioned Respondents and the Appellant at all, and that it was extremely unlikely, to put it mildly, that the Respondents had intended to pay the Appellant personally, and would have paid him had they known the true facts. A fraud had therefore been committed upon them and in any event, the Appellant had been unjustly enriched at their expense, inasmuch as he had been paid the relevant amount which was not due to him on any basis whatsoever. It is clear from the relevant facts that the Appellant had made the mentioned misrepresentation intentionally and that this had caused the particular Respondents to make the payment to him. There was obviously no contractual nexus at all between the First and Second Respondents and the Appellant, and his version put before the court a *quo* was so farfetched, that in my view the learnerd Acting Judge had been correct in rejecting it. The well established principle is that a victim of false representation which induced it to enter into a contract or perform in terms of it, is entitled to restitution. This rule is founded on equitable considerations. It would certainly not be just that Appellant receive money due to the company and then spend it on his own interests whilst boldly asserting that there was no bar on him "utilizing and disposing of those funds as (he) pleased". This entitlement, as it was said in the answering affidavit, arose from the fact that he was the sole director of the company. Then again, as I have said, Mr. Coetzee SC was constrained to argue that everyone intended the money to be paid to the Company. He cannot have it both ways. See: ***Feinstein vs Niggli and Another 1981 (2) SA 684 AD at 700,*** and ***North West Provincial Government vs Tswaing Consulting CC 2007 (4) SA 452 SCA at 457 F-H.*** The court *a quo* made no material misdirection either on the facts or in law, and

in my view there is no basis on which his order can be challenged. Accordingly the Appeal is dismissed with costs, such cost to be on the scale as between Attorney and own client, having regard to the conduct of the Appellant which in my view cannot be defended on any basis. It was unethical, fraudulent and persisted in. This a Court should not countenance.

August 2012

JUDGE H J FABRICIUS
JUDGE OF THE NORTH GAUTENG HIGH COURT

I agree,

JUDGE M F LEGODI
JUDGE OF THE NORTH GAUTENG HIGH COURT

I agree,

JUDGE E M KUBUSHI
JUDGE OF THE NORTH GAUTENG HIGH COURT