REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
NORTH GAUTENG HIGH COURT, PRETORIA

12/02/14

CASE NO: 3489/07 and
CASE NO: 8456/07

(1) REPORTABLE: No
(2) OF INTEREST TO OTHER JUDGES: No
(3) REVISED.

13 FEBRUARY 2014

KE MATOJANE

In the matter between:

BLUE CELL (PTY) LTD (IN LIQUIDATION)	APPLICANT
and	
BLUE FINANCIAL SERVICES LIMITED	1ST RESPONDENT
BLUE EMPLOYEE BENEFITS (PTY) LTD	2ND RESPONDENT
VAN NIEKERK, DAVE	3RD RESPONDENT
SMIT, WESSEL	4TH RESPONDENT
VAN DER WESTHUIZEN, RENIER	5TH RESPONDENT
MOSTERT, WAYNE ANTON	6TH RESPONDENT

IN RE:	**CASE NO: 3489/07**
BLUE CELL(PTY) LTD (IN LIQUIDATION)	**1ST APPLICANT**
WAYNE ANTON MOSTERT	**2ND APPLICANT**
and	
BLUE FILNANCIAL SERVICES LIMITED	**1ST RESPONDENT**
BLUE EMPLOYEE BENEFITS (PTY) LTD	**2ND RESPONDNET**
VAN NIEKERK, DAVE	**3RD RESPONDENT**
SMIT, WESSEL	**4TH RESPONDENT**
JSE LIMITED	**5TH RESPONDENT**
AND IN RE:	**CASE NO: 8456/07**
BLUE FINANCIAL SERVICES LIMITED	**APPLICANT**
And	
BLUE CELL (PTY) LTD (IN LIQUIDATION)	**RESPONDENT**

J U D G M E N T

MATOJANE J:

[1] This is an application by a co-liquidator brought in terms of the common law powers of the Court and in the alternative in terms of Uniform Rules of Court, 42(1)(c) aimed at firstly, setting aside the judgment of Bertelsmann J under case number 3489/07 in its entirety and directing that the order granted in favour of the respondents be amended in the terms identified, secondly, that the costs order granted on 8 May 2007 under case number 8456/07 be set aside and substituted with the order directing the respondents to pay costs de bonis propriis.

Background

[2] First respondent held two thirds of the issued share capital in the applicant and was registered as a member in the applicant's register of members prior to the date of applicant's liquidation. The sixth respondent held the remaining one third of the share capital.

[3] In terms of the agreement concluded between the parties, sixth respondent, was obliged to contribute in respect of his one third share in the equity of applicant, his know-how, contacts, goodwill and management of the applicant and first respondent contributed in respect of its two third share in the equity of the applicant, its funding on agreed basis.

[4] First respondent breached its funding obligations to applicant on the alleged dismal failure of applicant to achieve either of its budgets over the period that purportedly substantiated the failure and lack of the financial future of the respondent. The applicant brought an application ("the first application ") seeking a statement of account and payment of its revenue from the first respondent. The respondents not only opposed the relief sought but countered by bringing an application seeking the winding-up of the applicant on the alleged applicant's poor financial performance. Applicant was liquidated at the instance of the First and Second respondents and mulcted with costs. Subsequently, the applicant's liquidators approached the Court for an account of profits made by the respondents as a result of the unlawful appropriation of the applicant's business both pre and post liquidation, the application was also opposed.

[5] It became common cause that the respondents had prior to applicant's liquidation unlawfully diverted a large portion of income that should have accrued to the now insolvent company into their pockets. Further, the respondents had in both earlier applications materially misrepresented the financial state of affairs of the applicant. Bertelsmann J found in the accounting application that deponents to the founding affidavits that caused applicant to be liquidated were fully aware of the fact that they painted a picture for the court that was designedly distorted and did not disclose relevant facts relating to the turnover and profit of the company now in insolvency as a result of such misrepresentation.

[6] The Court ordered first and second respondent to pay to the applicant both its pre and post liquidation net profits as reflected in the first and second respondent's accounting in the amounts of R 717 094.00 and R1 177 464.00 respectively. The Court further ordered punitive costs of the accounting application and that the papers in the application be referred to the Director of Public Prosecution to investigate circumstances under which the liquidation order came to be made.

[7] The Supreme Court of appeal dismissed first and second respondent's application for leave to appeal rendering the liquidator's application final. The liquidator's application replaced the relief sought in the "first application" and the winding up application has been overtaken by events, the cost orders are the only portion still alive. In these proceedings applicant in his heads of argument and in court has distanced itself from the initial relief sought in the notice of motion and now seeks rescission of the costs orders in the two applications, contending that they had been obtained because the respondents had misled the court by deliberately misrepresenting and concealing material facts from the court with regard to the financial feasibility of the applicant's business. It was submitted on behalf of the applicant that, had the court known the true facts, the orders would not have been granted.

[8] In opposing the application for rescission the respondents submitted, correctly in my view, that the relief sought by applicants in the notice of motion is unsustainable as applicant's case is prefaced on fraud which is perforce deliberate and not a result of a mistake as applicant was unaware of the fraud. See **Tshivhase Royal Council v Tshivhase** 1992(4) SA 852 (A) at 863 . Rule 42(1)(c) provides :

> *"42. Variation and rescission of orders*
>
> *(1) The court may, in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind or vary:*
>
> *(a) ...*
>
> *(b) ...*
>
> *(c) an order or judgment granted as the result of a mistake common to the parties"*

[9] Counsel for the respondents further correctly, in my view, submitted in his heads of argument and in Court that under common law, applicant would only be entitled to a *restitutio in intergrum* if he can show that the "first application" was obtained by the defendants' fraud. See **Robinson v Kingswell** 1915 AD 277. It follows therefore that this court, not being a court of appeal has no power to amend the judgment in the terms identified.

[10] A Court may however, assume its inherent jurisdiction to rescind in the interest of justice. In terms of the common law a judgment can be set aside on the grounds of fraud if it can be shown that the fraudulent evidence diverged to such an extend from the true facts that the Court would, if the true facts had been placed before it, have given a judgment other than what it was induced by the incorrect evidence to give. See **Childerley Estate Stores v Standard Bank of SA Ltd** 1924 OPD 163, **Nyingwa v Moolman NO** 1993 (2) SA 508 (TK), **De Wet and Others v Western Bank Ltd** 1979 (2) SA 1031 (A). In the instant case it is common cause that the judgment was predicated on fraudulent evidence and the respondents intended to mislead the court. In my view, it would be manifestly inequitable and not in the interest of justice for the respondents to benefit from cost orders made as a result of fraud deliberately committed upon the Court, the applicant and its creditors.

[11] The submission that applicant has not demonstrated that the court would, had the true facts been placed before it, given a judgment other than what it was induced by the incorrect evidence to give, is fallacious. It must surely be so that the Court repeatedly had regard to the alleged financial failure of the applicant asserted by the respondents in their founding affidavits. In its judgment on the winding up application, the Court stated *inter alia* that "*the projected results were not achieved; on the contrary, the results of the first applicant's activities were nothing short of poor- a meagre total of 78 cellular were sold until November 2006*". "*... the lack of the first applicant's commercial success...*". "*... there is every indication that the first applicant has struggled to take off....*".

[12] It can hardly now be contended that the deliberate and dishonest misrepresentation of the financial standing of the applicant did not result in the Court

refusing the relief sought in the "first application" and granting the relief sought in the liquidation application. The facts are common cause, the Court has been misled leading to a winding up and demise of the applicant and the appropriation of its growing business for no value. The costs orders in favour of the respondents could only have been reached on the basis that costs followed the result. I can see no reason why, considering the Court's common law powers of rescission, I should not order the rescission of the costs orders so that the liquidated company is not saddled with costs obtained through dishonesty. This will, in my view, to some extend right the wrong perpetrated against the liquidated company even if it can't be resuscitated.

[13] The contention that because the applicant sought an order for specific performance in the first application and Betelsmann J found that applicant had made out a *prima facie* case but in the exercise of his discretion, refused to grant an order for specific performance is in my view, equally without merit. In the application for leave to appeal in the accounting application the Bertelsmann J found that *"there was ample evidence that the Court was inveigled into granting a liquidation order by skewed – if not designedly false presentation of facts"* it is because of this deceit that the court concluded that there was no compelling evidence that applicant would become financially self supporting and refused to grant an order for specific performance.

[14] Another issue remains to be addressed briefly. Respondents expressly conceded that income due to the applicant was unlawfully diverted into their pockets and now raises technical arguments to prevent the applicant in its quest to reverse its inequitable mulcting in costs. In my view, opposition in the present proceedings was ill advised in the light of the deceitful conduct of the respondent. A punitive costs order as a mark of disapproval of respondents reprehensible conduct is warranted.

[15] The following order is made:

1. The cost order made on 8 May 2007 under case number 3489/07 is set aside and substituted with an order that the First to Fourth Respondent jointly and severally pay the costs of the application for specific performance on a scale as between attorney his own client.

2. The cost order made on 8 May 2007 in the Liquidation application under case number 8456/07 is set aside and substituted with an order directing the first respondent, jointly and severally with the second to fourth respondents, pay the costs of the liquidation inclusive of applicant's full costs of opposition thereto on a scale as between attorney and his own client.

3. The First to Fourth Respondents jointly and severally are ordered to pay the costs of this application on the scale as between attorney and own client.

KE MATOJANE
JUDGE OF THE HIGH COURT