IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.
13/05/2014
DATE

Case No: 55503/11 ~~17195/2010~~
Last date of hearing: 18 April 2014
Date of judgment: 13 May 2014

In the matter between:

GRINDROD BANK LIMITED	Plaintiff
and	
JEREMY ARTHUR TORODE N.O.	First Defendant
CAROL-ANN TORODE N.O.	Second Defendant
DEE-BRONWYN BEZUIDENHOUT N.O.	Third Defendant
JEREMY ARTHUR TORODE	Fourth Defendant

JUDGMENT

PHATUDI J:

[1] The plaintiff is a registered bank, duly registered as a public company and incorporated with limited liability in accordance with the banking and company laws of the Republic of South Africa.

[2] The plaintiff instituted this action against the first, second and third defendants in their capacity as the trustees for the time being of the Sania Trust (the trust) for monies lent and advanced in terms of the loan agreement annexed to the declaration as annexure "A".

[3] The fourth defendant (Mr Torode) is sued on the strength of his agreement to bind himself jointly and severally, as surety and co-principal debtor with Sania Trust in terms of the loan agreement. The plaintiff further seeks an order declaring the property owned by Sania Trust specifically executable.

[4] The defendants disputes the plaintiff's entitlement to claim the money and to seek the specifically executable of the property on the basis that the loan agreement was *void ab initio* on the basis that the loan agreement transaction contravened the provisions of section 38(1) of the Companies Act, 61 of 1973.

[5] During the trial proceedings, the defendant conceded that the amount set out in the plaintiff's certificate of balance is the correct

amount due. It was further conceded that Mr Torode's authority to act in purporting to conclude the loan agreement was proportionally ratified by the trustees for the time being of Sania Trust. The defendants thus, do not persist with their denial thereto.

[6] Two witnesses testified for and on behalf of the plaintiff. Gavin Price, an attorney at law, testified that he was instructed by Umoya Airtime Solutions (Pty) Ltd (Umoya) at the time the loan agreement was drafted and concluded. Umoya was in dire need of cash to settle the debt of Electro Sure CC T/A Custom Electronic Solutions (CES). CES threatened Umoya with legal action and to make dealings with other companies in relation to the distribution of terminals. Mr Torode, who was Umoya's agent in Gauteng, intended to assist Umoya to get out of the said debt which was a major setback for him as well.

[7] Mr Price introduced Mr Torode to Ryan Oliver (Mr Oliver) who was employed by Grindrod (the plaintiff). Mr Torode applied for a loan through Sania Trust of an amount of R2 million from the plaintiff. The money would be used to purchase 45% of White's shares in

Umoya. The money would actually not be paid to Mr White but to CES.

[8] Mr Price prepared documentation setting out the existing and proposed shareholding in Umoya. This led to the submission of the recommendation to the plaintiff by Mr Oliver. The facility letter was then issued on the 02 September 2009. It is recorded that 'the facility is for an amount of R2, 000,000-00 (two million rand) which will be utilised for the acquisition of 45% shareholding in Umoya Airtime Solutions (Pty) Ltd. (the company)

[9] It is recorded under special conditions, among others, that

'(d) The Bank requires the company's Shareholder's Agreement acknowledging the Borrower's investment in the company as well as the Bank's facility to the Borrower. The Shareholders Agreement should incorporate that the company is responsible for the monthly repayments of capital and interest on this facility.'

[10] Mr Oliver advised Mr Price and Mr Torode of the possibility for the plaintiff paying out the loan amount to Sania Trust as soon as the loan agreement was signed. Mr Price, on that advice, wrote to CES

informing them of imminent availability of cash in the company and provided CES with the facility letter received from the plaintiff.

[11] The plaintiff instructed Cox Yeats, a firm of attorneys to cause registration of the mortgage bond. On perusal of the letter by Roger Green (Mr Green) of Cox Yeats, he, Mr Green, advised Mr Oliver of the plaintiff that if the company is required to stand guarantee for the obligations of a shareholder in acquiring shares in the company, then that act will require a special resolution passed by the shareholders of that company. Mr Green further advised the plaintiff that in the absence of such a resolution renders the proposed transaction in breach of section 38(1) of the Companies Act.

[12] Mr Price, knowing that the required special resolution could not be passed, suggested the alternative which he believed would be able to "fix" the impediment created by section 38. Mr Price then drafted the sale of shares agreement which was never concluded and or signed by any of the parties. The said agreement was then referred to during the testimonies of the witnesses. Mr Price testified that he informed Mr Green that the shares and loan account in the

company had already been acquired and paid for knowing that that was not the position.

[13] Mr Green insisted on seeing the shareholding agreement which Mr Price referred to, to ensure and to satisfy him that the transaction does not contravene the provisions of section 38 of the Companies Act.

[14] Mr Price then sends Mr Green a second draft of the sale of shares agreement which records that the purchase price has been paid as opposed to the first draft. The draft has a breakdown of payments purportedly made by Mr Torode to CES. The sale of shares agreement tabled by Mr Price was not signed by the parties. It remained a concept document.

[15] The plaintiff could not pay out the loan amount prior to the registration of the bond. This prompted Sania Trust to apply for a bridging finance. This was done with the advice and knowledge of Mr Price and Mr Oliver for the plaintiff.

[16] The loan agreement, which ought to have been paid to Sania Trust, was paid by the plaintiff directly to the bridging finance company. Mr Price and Mr Oliver conceded to that effect during their testimonies.

[17] Section 38(1) of Companies Act provides that

'No company shall give, whether directly or indirectly, and whether by means of a loan, guarantee, the provision of security or otherwise, any financial assistance for the purpose of or in connection with a purchase or subscription made or to be made by any person of or for any shares of the company, or where the company is a subsidiary company, of its holding company.'

[18] It is clear from the reading of section 38(1) that Green was right that the initial transaction intended to be concluded between the plaintiff and the defendant would be in contravention to the section.

[19] Both parties did their best to paint the bitterness of the section with a little sugar by drafting the sale of shares agreement purporting to have been concluded prior to the lending of money. Mr Price, Mr Oliver and Mr Torode were aware if not knew or reasonably expected to have known that the said shares were not paid for prior to the

lending of money. Put differently, the parties knew that the money to be loaned to Sania Trust was in fact intended to purchase 45% of Mr White's shares. They were as well up to speed that the money will be used by Sania Trust to pay Mr White for his shares.

[20] In my view, the original loan agreement transaction of which Umoya would stand as guarantee is the true intention of the parties. I, however, accept that the parties were not aware of the provision of section 38(1) of the Companies Act at that time.

[21] The plaintiff failed to "walk away" from the transaction as Mr Oliver testified that they would have done so if the transaction was indeed in contravention of the section. He, however, conceded that he issued the second recommendation to the plaintiff that the shares have already been paid for knowing that that was not the position.

[22] Mr Torode was as well in the know of the circumvention. He testified to the effect that as far as the correctness of the documentation was concerned, he knew that the documentation was not correct because it was altered to make the section 38 issue no

longer an issue and the fact that it had been done by all parties duly represented. He indicated that Mr Price represented the company, Cox Yeats and Mr Oliver represented Grindrod Bank. Of importance was that Mr Torode knew that the amendment of the original documentation was to "make the section 38 issue no longer an issue".

[23] All sales of shares agreements are not signed by any of the parties. The documents relied on as the sales of shares are concept agreements which cannot be accepted as evidence. These are therefore, no sale of shares agreements handed up to this court. It is trite law that a concept document is evidentially not admissible.

[24] In my consideration of the evidence, all parties concluded the loan agreement in its amended form knowing that the transaction is in contravention of the provisions of section 38 of Companies Act.

[25] In my assessment of the evidence presented, the doctrine "*in pari delicto*" came to my mind in that both the plaintiff and defendants are equally at fault. The doctrine provides that the court will not

enforce an invalid contract and that no party can recover in an action where it is necessary to prove the existence of an illegal contract in order to make his or her case.

[26] It is stated in **Klokow v Sullivan 2006 (1) SA 259 (SCA)** that the maxim "*in pari delicto potior conditio defendentis*", which curtails the right of the delinquent party to avoid the consequences of his performance or part performance of an immoral or illegal contract, is concerned with the moral guilt of contracting parties, not their criminal liability.

[27] The defendant's counter claim or their unjustified enrichment claim finds no application where both parties are at fault in concluding an illegal contract. Reliance on **Mkhwanazi v Quarterback Investment (Pty) Ltd 2013 (2) SA 549 (GSJ)** is misplaced. The *ratio decidendi* has since been replaced by **Quarterback Investment (Pty) Ltd v Mkhwanazi 2014 (3) SA 96 SCA.**

[28] In Mkhwanazi case the SCA found that Quarterback Investment defrauded Mkhwanazi. In this case, neither the plaintiff nor the defendants was defrauded or fraudulently misrepresented by either

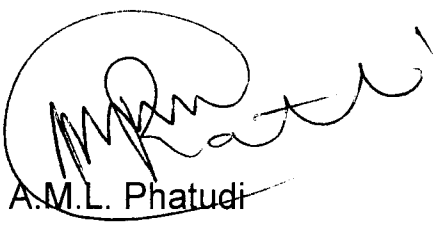
party. Both parties participated knowing very well that the transaction as amended is a mere disguise.

[29] In my view, the principle to apply in *casu* is "*potior/melior est conditio possidentis*". In simpler terms, "better is the condition of the possessor". Put differently, he who is in possession is in a better position. This brings me to the conclusion that both the plaintiff's claim and the defendant's counter claim stands to be dismissed.

[30] It is trite that costs follow the event. None of the parties succeeds as both are at fault in concluding a disguised contract. Each party stands to pay its own costs. I, in the result, make the following order.

Order:

1. **The plaintiff's claim is dismissed.**
2. **The defendant's counter claim is as well dismissed.**
3. **There shall be no order as to costs.**



A.M.L. Phatudi

Judge of the High Court

On Behalf of the Plaintiff:	Cox Yeats Attorneys C/O Stegmanns Inc. 379 Lynnwood Road Menlo Park Pretoria Adv. L.B Broster SC
On Behalf of the 2nd Defendant:	Webber Wentzel C/O Macrobert Inc. Macrobert Building Cnr Jan Shoba & Justice Mahomed Streets Pretoria Adv. R. Moultrie Adv. N. Muvangua