

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case No.: 14371/2011

In the matter between:

TOURVEST HOLDINGS (Pty) LTD

Plaintiff

and

PASCAL NONKAM

Defendant

JUDGMENT

1. The plaintiff is Tourvest Holdings (Pty) Ltd, trading as Tourvest Travel Services, a company with limited liability duly incorporated in terms of the old Companies Act 61 of 1973, with principal place of business at Fourways Crossing, Witkoppen Road, Fourways, Johannesburg.
2. The defendant is Pascal Nonkam, a male Cameroonian businessman of c/o [...] Pretorius Street, Pretoria Central, Pretoria.
3. The defendant is a director of a company known as Tulah Trading (Pty) Ltd, ("TULAH"), whose registered address is to the plaintiff unknown. No

particulars of any business engaged upon by TULAH have been disclosed in the formal exchanges between the parties.

4. The plaintiff claims the sum of R 754 740, 00 from the defendant personally, together with interest and costs..
5. The plaintiff is a tour operator and as such arranges visits to Pretoria by i.a. civil servants who attend courses in this city.
6. The plaintiff usually books hotel accommodation for the participants at courses and conferences. It incurs liabilities for the hotel bills to the suppliers of these hospitality services.
7. During the period April to June 2009 the plaintiff arranged accommodation at the Pretoria Hotel at 230 Hamilton Street, Arcadia, Pretoria for a number of civil servants who stayed at the aforesaid hotel for an extended period.
8. The Pretoria Hotel is owned and operated by a company known as Madeleine Properties (Pty) Ltd. Plaintiff became indebted to the said Madeleine Properties in the sum of R 754 740, 00 in respect of the aforesaid accommodation. The plaintiff effected payment of this sum into a bank account of TULAH, Account No [.....] held at the Arcadia Branch of the Standard Bank. The payment was made on or about the 16th July 2009.
9. Plaintiff's employee effected the payment in the *bona fide* belief that this account was the one into which payment had to be effected to Madeleine Properties (Pty) Ltd. It had made payments into this account in the past for the same purpose.
10. Unbeknown to the plaintiff, however, the Monkam family, which operates various businesses in Pretoria, had become embroiled in an internecine battle about the control of the family empire. The defendant was one of the

protagonists in the family feud. At the time the plaintiff made the disputed payment, he had lost control of the affairs of Madeleine Properties. While the defendant was still at the helm of his commercial empire, including this business, he used TULAH's account as trading account for the entire group he administered. Payments due to any of the businesses in that group were deposited into this account.

11. When the disputed payment was effected, defendant no longer administered Madeleine Properties and TULAH was not entitled to any payment from the plaintiff. In fact, the said account was in debit when the disputed sum was deposited into it.
12. The plaintiff was an outsider to the family feud and was entitled to assume that the payment made into an account used for the purpose of settling Madeleine Properties' claims in the past was regular.
13. When the mistake was discovered as a result of Madeleine Properties demanding payment for their account that had remained unsatisfied, plaintiff communicated with the defendant by telephone through an authorised employee, requesting the refund of the monies paid in error. Defendant referred the employee to his attorney, Mr Sampie Henning..
14. Defendant was an authorised signatory of the said account, but later lost this power as a result of the arbitration proceedings he and his family members entered upon to resolve their disputes. He remained a director of the company at all relevant times, however, allegedly being removed as such some months after he caused the funds in the TULAH account to be attached for his benefit.
15. A request to the bank to reverse the payment failed because the Bank could not obtain authorisation for the repayment of the funds.

16. Further communications to the defendant and to his attorney, Mr Henning, were met with the same result. Plaintiff addressed two letters to the attorney that drew no response. A letter by plaintiff's lawyer followed, still with no positive reaction. This letter was addressed to Mr Henning in October 2009.
17. There can therefore be no shadow of doubt that the defendant was fully aware of the fact that TULAH had no claim to the credit balance in its account and that, if such funds were to be removed out of this bank account, TULAH would never be able to refund the plaintiff as it was for all intents and purposes dormant as soon as the defendant was divested of the control of the family business.
18. Defendant was also at all times after October 2009 aware of the fact that plaintiff had transferred the funds into this account in error.
19. It was never disputed during the trial that Mr Henning informed the defendant of the content of the letter of demand sent to his offices, as it was his duty toward his client to do.
20. Against this background the defendant, through the offices of his attorney, caused a warrant of attachment to be issued under case no 11967/07 against TULAH for payment of the full amount in TULAH's bank account, swearing to an affidavit that such monies were owing and due to him as a result of an interim order made by this court during the family battles between himself, his father, his sister and other siblings about the control of the latter company and its associated businesses. He also caused warrants of attachment to be issued against at least one other company in the same matter and on the same allegations, namely Madeleine Properties. The warrant against the latter

company was set aside by this court in proceedings brought by way of urgency at the instance of his family members.

21. The defendant was represented in all the family battles by his present attorney of record, Mr Sampie Henning.
22. The warrant of attachment was executed during January 2010, without any reference to the plaintiff and without informing the plaintiff's attorneys of record of the defendant's intention to appropriate the credit in the TULAH bank account.
23. Plaintiff issued summons against the defendant in February 2011, claiming payment of the full amount paid into the TULAH account, alternatively the sum which the defendant appropriated to himself by way of the warrant referred to above. As it turned out, the only sizeable withdrawal from the account after the disputed deposit was made is a sum of just more than R 111 000, 00 effected by SARS in respect of unpaid taxes.
24. The plea filed on his behalf denies that the defendant had signing powers on the account into which the money was paid. In evidence it later emerged that any payments made for or on behalf of any company in the group were controlled by defendant's sister and two accountants pending the finalisation of the arbitration proceedings. As stated above, the account was no longer used as a transferring or accommodation account for the various companies that were controlled by the defendant before the family feud. Once the arbitration award was made, defendant lost all rights to the companies, although he maintained that he would 'appeal' the arbitration award. He remained a director of TULAH, though until some months after the appropriation of the sum in the TULAH account.

25. The plea further stated that Mr Henning never represented TULAH. It was common cause, however, that in his capacity as the defendant's personal lawyer he was in duty bound to inform his client of the letters he received dealing with the payment that was not due.
26. The plea further put in issue that the money attached by the defendant was not *in specie* the funds transferred to TULAH. He denied any knowledge of the fact that TULAH was not entitled to the funds.
27. When the trial commenced, defendant raised the point in *limine* that Tula Trading (Pty) Ltd had not been joined as an interested party. This point was without merit. There is clear authority that directors and others guilty of reckless or fraudulent trading can be held personally liable for a company's debts even if the company is neither insolvent nor dormant. The point in *limine* was duly dismissed.
28. The evidence presented by the plaintiff was never truly in dispute. It clearly established that TULAH was indebted to the plaintiff on the grounds of undue enrichment, at the very least. It was not denied that the defendant caused the sum of R 593 641, 49 to be attached on the 26th January 2010.
29. In his evidence the defendant denied that he was aware of the plaintiff's claim or of any unauthorised payment made into the TULAH account. He was a very poor witness whose testimony was clearly false and untrue. It was patently obvious that both he and his attorney were fully aware of the true state of affairs when they caused the funds to be attached and transferred to the defendant. He was also at all times aware of the dormant state of the TULAH account prior to the deposit mistakenly made.

30. In addition, Monkam denied that he had no claim against TULLAH after the finalisation of the arbitration. Given the fact that the arbitral award terminated all his claims to any of the family assets, including any claims against TULLAH, this denial is not in accordance with the facts of this matter.
31. A striking feature of the defendant's case was the failure to call his attorney, Mr Sampie Henning, his legal advisor at all times relevant to the dispute. If there was any legally tenable basis for the defendant's alleged claims against TULLAH, or any truth in his denial of any knowledge of the mistaken payment of which Mr Henning had indubitably been informed, Mr Henning was the person who could have substantiated the defendant's version. The failure to call him amounts to a clear confirmation of the fact that the defendant's evidence must be rejected wherever it conflicts with that of the plaintiff.
32. The defendant's actions amount to a clear fraud upon the plaintiff and upon TULLAH. Depleting the company's account for his own ends left the company insolvent and unable to pay its creditors. He must therefore be declared liable to plaintiff for any prejudice suffered by the latter, not only for the sum he appropriated for himself, but for any and all liabilities that TULLAH has incurred. As a director his first duty was to protect the company in the exercise of his fiduciary obligations, which were patently transgressed while the defendant had a clear conflict of interest.
33. This action was instituted prior to the commencement of the 2008 Company Act and therefore the provisions of sections 423 and 424 of Act 61 of 1973 apply to the present set of facts. They read:

423. Delinquent directors and others to restore property and to compensate the company.

(1) Where in the course of the winding-up or judicial management of a company it appears that any person who has taken part in the formation or promotion of the company, or any past or present director

or any officer of the company has misapplied or retained or become liable or accountable for any money or property of the company or has been guilty of any breach of faith or trust in relation to the company the Court may, on the application of the Master or of the liquidator or of any creditor or member or contributory of the company, enquire into the conduct of the promoter, director or officer concerned and may order him to repay or restore the money or property or any part thereof, with interest at such rate as the Court thinks just, or to contribute such sum to the assets of the company by way of compensation in respect of the misapplication, retention, breach of faith or trust as the Court thinks just.

(2) This section shall apply notwithstanding that the offence is one for which the offender may be criminally responsible.

424. Liability of directors and others for fraudulent conduct of business.

(1) When it appears, whether it be in a winding-up, judicial management or otherwise, that any business of the company was or is being carried on recklessly or with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the Court may, on the application of the Master, the liquidator, the judicial manager, any creditor or member or contributory of the company, declare that any person who was knowingly a party to the carrying on of the business in the manner aforesaid, shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court may direct.

(2) (a) Where the Court makes any such declaration, it may give such further directions as it thinks proper for the purpose of giving effect to the declaration, and in particular may make provision for making the liability of any such person under the declaration a charge on any debt or obligation due from the company to him, or on any mortgage or charge or any interest in any mortgage or charge on any assets of the company held by or vested in him or any company or person on his behalf or any person claiming as assignee from or through the person liable or any company or person acting on his behalf, and may from time to time make such further orders as may be necessary for the purpose of enforcing any charge imposed under this subsection.

(b) For the purposes of this subsection, the expression 'assignee' includes any person to whom or in whose favour, by the directions of the person liable, the debt, obligation, mortgage or charge was created, issued or transferred or the interest was created, but does not include an assignee for valuable consideration given in good faith and without notice of any of the matters on the ground of which the declaration is made.

(3) Without prejudice to any other criminal liability incurred, where any business of a company is carried on recklessly or with such intent or for such purpose as is mentioned in subsection (1), every person who was knowingly a party to the carrying on of the business in the manner aforesaid, shall be guilty of an offence.

(4) The provisions of this section shall have effect notwithstanding that the person concerned may be criminally liable in respect of the matters on the ground of which the declaration is made.

34. The defendant is therefore declared liable to the plaintiff for payment of the full amount of R 754 740, 00, interest and costs. Given the fact that dishonesty

has permeated his actions, a punitive costs order of applying the scale of attorney and client is justified.

35. The following order is made:

1. Defendant is ordered to pay to plaintiff the sum of R 754 740, 00;
2. Interest on the said sum of R 754 740, 00 at the rate of 15,5% *a tempore morae* until 31st August 2014; and at 9% from 1 September 2014 until date of payment;
3. Costs of suit on the scale of attorney and client.

Signed at Pretoria on this 25th day of September 2014.

E BERTELSMANN

Judge of the High Court.