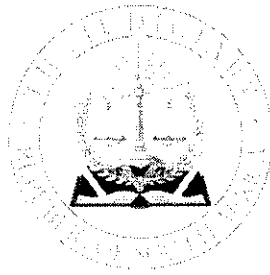


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

- 1) REPORTABLE: YES/NO
- 2) OF INTREST TO ORTHER JUDGES YES/NO
- 3) REVISED.

5/2/2016
DATE

PP
SIGNATURE

5/2/2016

CASE NO.70750/14

In the matter between:

AVANTECH LIMITED

APPLICANT

And

WILLIAM HENRY CHARLES FRYER

1st RESPONDENT

CHARMAINE FRYER

2nd RESPONDENT

JUDGEMENT

SEMENYA AJ

[1] AVANTECH LIMITED (Applicant) is part of a group of Companies owned by Zambian Cuturi family, registered and conducting its business in the Republic of Zambia. Mr Carlo Cuturi, the deponent in both Applicant's founding and replying affidavit, is one of its Directors.

[2] 1st and 2nd Respondents, both of whom South African citizens, are married to each other out of community of property. It appears from the papers filed of record that the order sought in this application is in respect of 1st Respondent only. It is undisputed that 1st Respondent is the owner of two immovable properties situated within this court's area of jurisdiction.

[3] Applicant seeks an order for the compulsory sequestration of 1st Respondent's estate in terms of the provisions of the Insolvency Act 24

of 1936 on the basis that 1st Respondent has, as Applicant's employee, misappropriated a large sum of money from applicant and also that he has committed an act of insolvency.

[4] It is common cause that during January 2013, Applicant employed 1st Respondent as its Chief Financial Officer (CFO). It is further common cause, albeit for different reasons, that 1st Respondent abruptly left his employment during February 2014 and returned to South Africa with his family.

[5] The eight claims of misappropriation of funds relied upon by Applicant are that, as CFO of the Company, 1st Respondent transferred monies to the tune of approximately R5 million from Applicant's bank account into the accounts of persons or entities residing or conducting businesses in South Africa, to whom 1st Respondent had a connection. That the transactions concerned were done without the knowledge and consent of the company's Directors.

[6] Applicant further alleges that in order to cover his ill dealings, 1st Respondent deleted the names of the actual recipient of the said money

and replaced them with names of entities that Applicant normally conducted business with, such as Zambian Revenue Authority (ZAR) or DHL Danzas Air (a courier company). According to Applicant, 1st Respondent was able to transfer this money as he was in possession of a secret pin code of its ABSA bank account so as to enable him to carry out his duties. Respondent's initials appear on the alleged forged statements.

[7] During February 2014, Applicant employed the services of a chartered accountant who, during his investigations of the financial status of the Company, raised some issues regarding the manner in which money were transferred from Applicant's bank accounts to other entities. Applicant alleges that the issues and questions that the said accountant asked Respondent, led to the latter's sudden departure from Zambia.

[8] 1st Respondent admits that the money referred to in Applicant's eight claims was indeed transferred to entities he had some connection with. However, he alleges that the said money was due and payable to him as either bonuses, overboard payment or incentives as agreed upon

between him and Applicant. He denies that he fraudulently misappropriated Applicant's funds and alleges further that all payments were done with the knowledge and consent of Applicant's Directors.

[9] In support of his allegations, 1st Respondent refers to a contract he concluded on Applicant's behalf with Bokomo Zambia which made him entitled to a commission of R4 million as well as the collection of money owed to Applicant by Barrick Gold Lumwana, a mining Company that did business with Applicant. This happened when his position in the company changed from CFO to Commercial Manager on 1 July 2013.

[10] 1st Respondent denies that he is the person who forged bank statements with the purpose of misrepresenting the actual recipient of the money. He alleges that other employees of Applicant, including its Directors, were in the habit of making copies of those statements. He further denies that he was provided with a pin code to Applicant's bank account which he could have used to defraud it.

[11] According to 1st Respondent, his relationship with Applicant turned sour when he began to raise concerns about the dubious manner in

which it was doing its business with Barrick Gold Lumwana. The concerns he raised caused a lot of tension and harassment against him by Applicant's Directors, which led to his sudden departure from Zambia and to return to South Africa. He alleges that he is now staying in Nigeria.

[12] Section 9 of Insolvency Act provide that-

"(1) A creditor (or his agent) who has a liquidated claim for not less than fifty pounds, or two or more creditors (or their agent) who in the aggregate have liquidated claims for not less than one hundred pounds against a debtor who has committed an act of insolvency, or is insolvent, may petition the court for the sequestration of the estate of the debtor"

[13] In **Kleinhans v van der Westhuizen NO 1970 (2) SA 742 (A)** at G it was held that a liquidated claim means a claim whereof the amount is fixed either by agreement, or an order of court or otherwise. The court went further to state on page 745 at H that:

"Although claims for damages (delictual or contractual) are generally are generally in the nature of unliquidated claims, this is so only when (as is usually the case) the monetary value thereof is not already determined, or likely to be capable of determination with ease and expedition. In every case where the monetary value is determined, or is

capable of easy and expeditious determination, the claim is (or should be) regarded as liquidated"

[14] It appears from Applicant's founding affidavit that the investigation into the company's financial affairs was still ongoing as at the time this application was lodged. I am however satisfied that the claim is capable of easy determination and is therefore a liquidated claim despite the fact that the claim is basically a claim for damages. In any event, the *locus standi* of Applicant is not in dispute.

[15] Although Respondent admits that the money referred to in this matter was received on his behalf by persons or entities nominated by him, he disputes the allegations by Applicant that he has misappropriated the said money. Counsel for 1st Respondent argued that this fact creates a dispute of fact between the parties and that this application should be dealt with according to the so called **Badenhorst rule-(Badenhorst v Northern Construction Enterprises (Pty) Ltd 1956 (2) SA 346 (T)** where it was stated that where a respondent disputes his or her liability on *bona fide* grounds, it is improper for an applicant to seek to recover a disputed debt by sequestration proceedings rather than by usual action procedure.

[16] It was contended on behalf of Applicant that the fact that Respondent failed to produce documentary evidence to prove that he was entitled to commission in *per se* shows that the dispute raised is not based on *bona fide* and reasonable grounds ground. It was further submitted that the dispute consist of bold denials or absolute refusal to tell the court the truth regarding what he did when he initialled the forged statements and why he did so in October 2013, after he was according to his version, appointed Commercial Manager.

[17] This argument is in line with what was said in **Wightman t/a JW Construction v Headfour (PTY) Ltd and Another 2008 (3) SA 371 SCA at 375 [13]** that:

"That a real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment."

[18] I however do not concur with the argument that the dispute raised by 1st Respondent is based on bold or absolute denials. I find the argument that the forgery could have been done by other employees or Applicant's Directors, who were in the habit of making copies of bank statements, to be reasonable. This includes the submission that the transactions could not have been done without detection by Directors who also had access to bank accounts. It is also reasonable that he would not have been in a position to produce supporting documents in view of the manner in which he left Zambia. On the contrary, instead of producing original bank statements, which could have been easily done, Applicant elected to rely on copies despite the fact that 1st Respondent denies that he is the person who forged them. I also find that the dispute raised is *bona fide*.

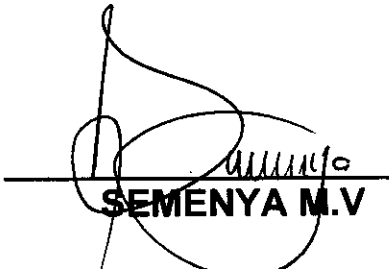
[19] The onus that rests on 1st Respondent is not to show that he is not indebted to Applicant, but that what he is required to show is that the indebtedness is disputed on *bona fide* and reasonable grounds. -**Kalil v Decotex (Pty) Ltd and Another 1998 (1) SA 943 (A)**. I find that Respondent has succeeded in discharging his onus of showing that his indebtedness is disputed on *bona fide* and reasonable grounds and the application should therefore fail. In my view, there exist real and

substantial disputes which can only be resolved by way of action proceedings.

[20] In line with the decision in **Badenhorst** (*supra*) I find that it is improper for Applicant to try and recover a disputed debt by way of application proceedings as this is clearly an abuse of process

[21] For this reason I make the following order:

1. Application for compulsory sequestration against 1st and 2nd Respondents' estates is dismissed with costs.
2. In the event of a need for Applicant to bring sequestration application after finalization of successful action proceedings, it might be necessary to supplement the instant sequestration application papers.



SEMENYA M.V

Acting Judge of the High
Court of South Africa, North
Gauteng Division, Pretoria

APPEARANCES

FOR THE APPLICANT: GRANT AND SWANEPOEL
INSTRUCTED BY: BEZUIDENHOUT VAN ZYL & ASSOCIATES INC

FOR THE 1ST AND 2ND RESPONDENTS: SD WAGNER SC
INSTRUCTED BY: MESSRS GEYSER VAN ROOYEN ARTTONEYS

DATE OF HEARING: 20 OCTOBER 2015

DATE OF JUDGEMENT: