IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED

_____ _____
DATE SIGNATURE

CASE NUMBER: 78746/17
DATE: 10 September 2019

ERF 311 SOUTHCREST CC Applicant

V

RICCO MUSA MOTSA First Respondent

JUDGMENT

MABUSE J

[1] The Applicant, Erf 311 Southcrest CC, a close corporation, duly registered as such in terms of the Close Corporation Act 69 of 1984 ("the Close Corporation Act") seeks the following orders against the Respondent, Ricco Motsa, an adult male attorney practising under the name and style of James Motsa Incorporated (the Attorneys) in Alberton:

"1. that the estate of the Respondent be placed under provisional sequestration;

2. that the rule nisi be issued calling upon the Respondent to advance reasons on a date to be determined by this honourable court why the estate of the Respondent should not be placed under final sequestration;

3. that the costs of the application form part of the costs of the administration of the Respondent's insolvent estate;

4. further and/or alternative relief."

It is important to point out that at the hearing of this matter no provisional sequestration order had been made by the court, and secondly, that the Applicant actually sought the sequestration of the Respondent's estate.

[2] The application is opposed by the Respondent who has for that purpose delivered his answering affidavit.

THE BACKGROUND

[3] The said attorneys, who are also conveyancers, received a total sum of R9,630,000.00 in instalments, being the proceeds of a sale by the Applicant of an immovable property to the purchasers, Sedcom (Pty) Ltd. The Attorneys were obliged by the law to keep the said amount in their trust account or interest bearing account until they had received from the Applicant to instructions to pay. Instead of the total sum of R9,630,000, R5, 254,277.05 was misappropriated. Despite lawful demand directed to him, the Respondent has refused or failed or neglected to repay the said sum of R5,254,277.05.

[4] On or about 10 April 2014 the Applicant sold to Sedcom (Pty) Ltd, the purchasers, a piece of land known as portion 673 (a portion of the portion 110) of the farm Elandsfontein. The purchase price was R9,630,000.00. It was agreed between the seller and the purchaser that the said purchase price should be paid in cash into the trust account of the Attorneys, namely account number 62067008542, on the signature of the agreement of sale. The property would, subsequent to the said payment, be transferred into the names of the purchasers.

[5] The purchasers made the following payments into the trust account of the Attorneys:

5.1 R4,969,283.92 on 22 May 2014;

5.2 R4,039,215.78 on 23 May 2014; and

5.3 R625,500.30 on 28 May 2014.

[6] At the material times the said amounts were deposited into the trust account of the said attorney firm's trust account, the Respondent was a director of the said Attorneys. According to the Applicant, the Respondent only resigned from the said firm on 14 September 2015.

[7] Despite the transfer of the immovable property into the names of the purchasers having taken place during May 2015, the aforementioned amount of R5,254,277.05 was misappropriated and consequently never paid to the Applicant by the Attorneys.

[8] Despite lawful demand the Respondent has failed or neglected or refused to pay the said amount to the Applicant.

[9] It is alleged by the Applicant that the Respondent owns the following properties and that, therefore, sizeable dividend will be received from the sequestration process:

9.1 Erf 7302, Roodekop, Johannesburg;

9.2 Erf 2468, Kanyamazane A, Mpumalanga;

9.3 Erf 1014, South Hills, Johannesburg;

9.4 Erf 76, Mayberry Park, Johannesburg; and

9.5 SS Rosa Court, Unit 103, Johannesburg.

[10] The Respondent raised only one defence in his answering affidavit against the Application. He denies that the Attorneys misappropriated the said amount of R5,254,277.05.

10.1 He states that upon receipt of the said payments, the amount was handled in accordance with the mandate of the Applicant, in particular of a Mr Pieter Willem Adriaan van der Merwe ("Van der Merwe") who was acting for the Applicant and who was the only person that he dealt with. Through the said Van der Merwe, the Applicant had authorised the said Attorneys to utilise the purchase price for the purpose of bridging finance. The Respondent had attached a document marked 'R1' to his answering affidavit. He contended that the payments made by the Attorneys were fully recorded in the said document. Also attached to his answering affidavit as 'R2' was the authorisation document, in other words, the document through which the Applicant authorised the Attorneys to use the funds for bridging finance.

[11] While the Respondent concedes that the deposits of the funds were made while he was still a director at the said firm of attorneys, he states that he resigned on 31 August 2015 and not on 14 September 2015 as alleged by the Applicant. The

Respondent denies that he is indebted to the Applicant in any manner whatsoever. In this regard the Court was referred by Advocate H. P. West, counsel for the Respondent, to what he called the Bardenhorst Rule, so-called because it emanates from **Bardenhorst v. Northern Construction Enterprises (Pty) Ltd 1956 (2) SA 346 (T).** In the Bardenhorst case the Court had to deal with an application for liquidation of a company. However, the principle espoused in the said matter applies in equal measures to sequestration applications. In the said case the Court had the following to say:

"Die maatskappy betwis die geldigheid van die vordering van £120, en wanneer 'n skuld te goedertrou betwis word, moet likwidasie aansoek geweier word. Hierdie proses is nie bedoel vir die beslissing van twyfelagtige skulde nie."

[12] In order to succeed with its claim against the Respondent, the Applicant must satisfy the requirements of s 9 of the Insolvency Act 24 of 1986. It provides as follows:

"9(1) A creditor (or his agent) who has a liquidated claim for not less than £50, or two or more creditors (or their agent) who in the aggregate have liquidated claims for not less than £100 against the 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] Strictly speaking it must be understood that the payments referred to above were made into the trust account of the Attorneys. They were not made into the trust account of the Respondent nor were they made to the Respondent. Accordingly, it

is the said firm of attorneys, who were obliged to pay the said amount to the Applicant and who on such default became indebted to the Applicant in respect of the monies paid into its trust account on behalf of the Applicant. Accordingly, the Respondent is not the Applicant's debtor. The only reason the Applicant has brought this application against the Respondent is that:

"(10) At the time of receipt of the debt deposits the Respondent was a director of James Motsa Incorporated, which is admitted.

(11) The Respondent only resigned as a director of James Motsa Incorporated on 14 September 2015, which is denied by the Respondent."

14.1 James Motsa Incorporated is a registered company in terms of the provisions of the Companies Act 61 of 1973 or Act or Act 71 of 2008. Section 23 of the Attorneys Act provided that:

"23(1) A private company may, notwithstanding anything to the contrary contained in this Act, conduct a practice if –

(a) such company is incorporated and registered as a private company under the Companies Act, 1973 [Act No 61 of 1973], with a share capital, and its memorandum of association provides that all present and past directors of the company shall be liable jointly and severally with the company for the debts and liabilities of the company contracted during their periods of office."

14.2 In order to succeed against the Respondent on a claim based on the provisions of s 23 of the Attorneys Act, which was still applicable in 2015 and which is still

applicable to this case by virtue of the provisions of s 12(2)(b) of the Interpretation Act 33 of 1957, the duty lies on the Applicant to satisfy the court:

14.2.1 that the amount of R5,254,277.05 was misappropriated;

14.2.2 that the misappropriation took place on a certain date or during a certain period;

14.2.3 that on the named date or during the specified period the Respondent was still a director or, in the words of s 23(1)(a) of the Attorneys Act, that the misappropriation took place during the Respondent's period of office.

14.3 S 424(1) of the Companies Act 71 of 2008 provides that:

"424(1) When it appears, whether it be winding-up, judicial management or otherwise, that any business of a 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, or any creditor or member or contributory to 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 debts or other liabilities of the company as the court may direct."

14.4 An Applicant for such a declaration of personal liability in terms of s 44(1) of the Companies Act for all or any debts of a company against the person who knowingly carried on the business of the company recklessly or fraudulently is required to prove, on a balance of probabilities, that the person sought to be held

liable had knowledge of the facts from which the conclusion is properly to be drawn that the business of the company was carried on recklessly or with intent to defraud the creditors of the company or creditors of any other person or any fraudulent purpose.

14.5 The Respondent would be drawn within the meaning of "the debtor" as envisaged by the provisions of s 9 of the Insolvency Act provided the Applicant fully satisfied the requirements of s 424(1) of the Companies Act. The Respondent cannot be "the debtor" of the Applicant for, apart from stating that *"at the time of receipt of the deposits the Respondent was a director of James Motsa Incorporated"* the Applicant has not brought an application under s 424(1) of the Companies Act; there was no allegation to support the application of the said section. The statement that the Respondent was a director at the time of the appropriation (without pointing out the date of the period), was also made in paragraph 5 of the letter of demand dated 7 April 2017. The basis for holding the Respondent liable was set out as being in terms of s 23 of the Attorneys Act 53 of 1979 read with the Companies Act 61 of 1973 and the Companies Act 71 of 2008.

14.6 I find that the Applicant has not proved that the Respondent was a debtor of the Applicant. I have not found any ground of justification in law for demanding payment with any money from the Respondent or anything in law that makes the Applicant the Respondent's creditor or that makes the Respondent the Applicant's debtor. I therefore find that the Applicant has failed to establish that it has *locus standi* to bring the application to sequestrate the estate of the Respondent.

[15]

15.1 In his founding affidavit the Applicant states that:

"The aforementioned payments were however misappropriated by James Motsa Incorporated, and was never paid to the Applicant, despite transfer of the immovable property being given to Sedcom, during or about May 2015."

The statement lacks material details. It does not state the date on which such misappropriation took place nor does it state the period during which it took place. Mr van der Merwe, counsel for the Applicant, relied on Annexure 'R1' to support his argument that the dissipation of the funds took place before 31 August 2015, in other words, in the period during which the Respondent was a director.

15.2 There is no explanation as to the character of Annexure 'R1' as a bookkeeping record. It is not known what precisely it is; who complied it; the circumstances under which it was compiled; the purpose of its compilation; whether or not it is a reliable document. Except for the purpose set out in the Respondent's paragraph 7.2 of the answering affidavit, 'R1' has not been helpful to the Court to make any determination. No one could verify it. I find that it did not help the Court to determine the date on which the misappropriation of the funds took place or the period in which it happened. As evidence it is an unreliable document.

[16]

16.1 The Respondent stated in his affidavit that the receipt of the money was handled in accordance with the mandate given to the firm by the Applicant, in particular, Van der Merwe. In support of this statement the Respondent has annexed to his answering affidavit a letter of authorisation in terms of which the said Van der Merwe, in his capacity as a member, he being duly authorised by the resolution of

Erf 311 Southcrest CC, authorised the Attorneys to invest the sum of R5 000 000.00 and use the funds for bridging finance.

16.2 Firstly, in the books of accounts of the firm the amount of R5 000 000.00 should be reflected as an investment. No proof was submitted before this Court that such was the case. This, however, is not a matter that calls for the attention of this Court at this stage. It may be an argument for another day. Secondly, authorisation has not been supported by any person who witnessed its making. There is no explanation by the Respondent why he failed to obtain the affidavits of anyone or both persons who signed as witnesses. This, however, does not necessarily mean that the authorisation is invalid. Its validity has not been challenged.

16.3 It is of paramount importance though to point out that the statements of the Respondent that he dealt strictly with Van der Merwe; that the Attorneys had been authorised by the Applicant, through the said van der Merwe, to use the sum of R5 000 000.00 for finance bridging purposes, have not been disputed by the Applicant. In her replying affidavit Debra-Anne stated that she knew that her father had entered into an agreement pertaining to bridging finance.

16.4 In fact, the latter statement was supported and thereby corroborated by Debra-Anne van der Merwe(Debra-Ann), the deponent to the founding affidavit. She deposed to an affidavit that she lodged with the Attorneys Fidelity Fund in terms of s 26 of the Attorneys Act on 1 February 2016. In the said affidavit, the said Debra-Anne stated that:

"We requested James Motsa Incorporated to advance certain amounts from time to time for running expenses. The total amount still held in trust by James Motsa

Incorporated as of date hereof is R5,254,277.05 as per the attached statement received from James Motsa."

In paragraph 6 of the said affidavit she stated that:

"My claim against the fund is calculated as follows:

1. Total entrusted amount: R8,431,032.69;

2. Less attorneys' fees: R0.00;

3. Less amount paid to me: R3,176,755.64; and

4. Less lawful expenses: R0.00

Balance due to me: R5,254,277.05."

Attached to this affidavit was a statement of account prepared on 26 May 2015 by the Attorneys. The said statement does not even reflect the amount of R5,000,000.00 which had been used for bridging finance as referred to by the Respondent and secondly, it does not reflect any fees due and payable to the attorneys for professional services rendered by them to the Applicant.

[17] It is clear now that Debra-Anne has admitted that a sum of R3,176,755.64 was advanced to the Applicant by the Attorneys. It would appear that the amount that was advanced to the Applicant in terms of the said affidavit should be added to the amount that was used for bridging finance purposes. Considering the amount that Debra-Anne has admitted that it was paid to the Applicant by the attorneys; the amount of R5 million that was used as bridging finance, I am not satisfied that the Applicant has successfully proved that:

17.1 the sum of R5,254,277.05 was misappropriated;

17.2 the date on, or the period during, which the said amount was misappropriated; and

17.3 that on the date or in the period during which the said amount of R5,254,277.05 was allegedly misappropriated the Respondent was still a director or in the office as envisaged by s 23 of the Attorneys Act.

[18] Therefore the following order is made:

The application is dismissed with costs.

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PM MABUSE

JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Applicant:	Adv LK van der Merwe
Instructed by:	AS Inc
Counsel for the Respondent:	Adv HP West
Instructed by:	Motsa (Musa) Attorneys c/o Malla Attorneys
Dates heard:	4 September 2019
Date of Judgment:	10 September 2019