IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
DATE 26 SEPTEMBER 2022 SIGNATURE

Case Number: 9179/2017

In the matter between:

ZELDA LYNN HOLTZMAN	First Plaintiff
THE EXECUTOR IN THE ESTATE OF THE LATE ALAN DUNNE N.O.	Second Plaintiff
and	
SIGN AND SEAL TRAINDG 32 (PTY) LIMITED	First Defendant
BULLET PROOF INVESTMENTS (PTY) LIMITED	Second Defendant
INTO SA TSHWANE (PTY) LIMITED	Third Defendant
RALPH MICHAEL ERTNER	Fourth Defendant

JUDGMENT

BESTER, AJ

1. The plaintiffs commenced with an action for payment in the amount of R2 635 527.28 said to represent 37.5 percent of the net proceeds realised from the sale of certain immovable property described more fully below.

2. The basis for the claim arises from their status as shareholders of the second defendant in terms of which they respectively hold 25.83% percent and 11.67 percent of the issued share capital in the second defendant, a company registered and incorporated in 2005 that in turn wholly owns the first defendant, a company registered and incorporated in 2003.

3. Until his death on 2 February 2013, the shares now held in law by the second plaintiff were held by Alan Dunne, a South African resident and Irish citizen who until his death, was the life partner of the first plaintiff and a director of both the first and second defendants. The second plaintiff succeeded him in law on 13 March 2013 following his appointment as executor of the late Alan Dunne's deceased estate.

4. The balance of the shares in the second defendant are held in the name of Carl Anthony McAllorum, an Irish citizen based in Dublin, Ireland. He owns 62.5 percent of the issued share capital in the second defendant. McAllorum is a director of both the first and second defendants together with Rachel Dunne ("***Dunne junior***"), an Irish citizen and resident who is the daughter of the late Alan Dunne and who succeeded her late father as director in the two companies.

5. At all relevant times hereto, the first defendant was the registered owner of a multi-floor commercial property in the central business district of Cape Town, more commonly known as no. 38, Hout Street, Cape Town ("***the immovable property***"). It was the first defendant's only asset with the second defendant's shares in the first defendant in turn representing its only asset.

6. On 1 July 2016, and at Vagos, Portugal, McAllorum representing the first defendant as seller, entered into a written sale agreement with St Albans

Property Investments (Pty) Limited ("***St Albans***"), represented by one Richard von Seidel in terms of which the immovable property was sold to St Albans as a going concern for a purchase consideration of R18 200 000.00.

7. The aforesaid sale took place without the knowledge of the first and second plaintiffs, who alleged that sale required shareholder approval from both the first and second defendants in terms of sections 112 and 115 of the Companies Act 71 of 2008 in that a special resolution adopted by those holding no less than 75 percent of the voting rights was required before the sale could be concluded.

8. The issue became academic in view of the approach adopted by the parties in the action as appears from what is stated below.

9. Upon learning of the imminent sale, the plaintiffs brought urgent proceedings before the Western Cape Division of the High Court under case number 24144/2016 on 13 December 2016 to prevent the unlawful registration of transfer of the immovable property into the name of St Albans.

10. Pragmatism prevailed and the urgent application was ultimately resolved on 19 December 2016 on the basis of a consent order handed down on the same date by Baartman J that in effect allowed the transaction to proceed but *inter alia* provided for the following:

    10.1. the conveyancers would pay R6 500 000.00 upon registration of transfer into the trust account of Attorneys Cliffe Dekker Hofmeyr;

    10.2. the aforesaid sum would be retained in trust as required in terms of section 78(2A) of the Attorneys Act 53 of 1979 pending the final resolution of all disputes between the parties regarding their entitlement to the proceeds;

    10.3. the plaintiffs had to commence with an action on or before 8 February 2017 in vindication of their entitlement to part of the proceeds, failing which the sum of R6 500 000.00 would be paid to

the first defendant upon five days' notice to the parties in the interdict proceedings.

11. The plaintiffs followed with the issue of a summons out of this Court in line with the order of 19 December 2016 of the Western Cape High Court on or about 6 February 2017. Only the first and second defendants defended the action.

12. In their particulars of claim, the plaintiffs allege that they are entitled to payment in the sum of at least R2 635 527.28 representing their share of the net proceeds of the sale of the immovable property to which the plaintiffs would have been entitled together with interest and costs, but for the fact that they were denied the right to share in those proceeds as a result of the unlawful actions they attributed to McAllorum and Dunne junior particularised more fully in the particulars of claim.

13. Whether their conduct was unlawful or not became moot by the time the trial commenced in view of the defence proffered by the first and second defendants, represented by Mr Elliot SC. In paragraph 12 of their amended plea they made the following allegations which became their sole basis of opposition to the relief claimed and which allegations are dispositive of the claim proffered in the name of the plaintiffs:

"In the alternative, and in the event of this Honourable Court finds that the Plaintiffs are entitled to payment from the proceeds of the sale of the property, the First and Second Defendants plead as follows:

12.1 The proceeds of the sale of the immovable property amounted to R6 766 037.51 (six million seven hundred and sixty six thousand and thirty seven Rand and fifty one cents) as is evident from annexure "SS1" hereto.

12.2 An amount of R6 500,00 000.00 from the proceeds of the sale is being held in the trust account of Cliffe Dekker Hofmeyr Attorneys, Cape Town in terms of the Court Order dated 19 December 2016.

12.3 The balance of R266 037,51 was paid to Tara Developers (Pty) Ltd ("***Tara***") in reduction of its loan account held in the first defendant.

12.4 The first defendant company has the following obligations, as contained in the draft financial statements of the first defendant dated 28 February 2019, which obligations must be settled from the proceeds of the sale (it being the only remaining asset in the company)

before distributions can be made to shareholders:

12.4.1 Following the payment as set out in paragraph 12.3, Tara's loan account held in the first defendant amounts to R2 118 589,46;

12.4.2 The first defendant is indebted to the South African Revenue Services ("***SARS***") for 2017 assessed tax in the amount of R496 231,42;

12.4.3 The first defendant is indebted to the SARS for 2018 assessed tax in the amount of R127 082,60.

12.5 Following payment of the debts (including all interest as accrued thereon and penalties charged for late payment) as set out in paragraph 12.4, the first defendant will be in a position to declare a dividend in order to make payment of the balance of the proceeds to the plaintiffs and the remaining shareholders. Such dividend would then be subject to dividend withholding tax of 20%.

12.6 The plaintiffs (as the remaining shareholders) can only be entitled to payment of 37.5% of the net amount available for distribution after payment of the liabilities and taxes of the first defendant, as set out herein above."

14. The first and second defendants accepted that they had the duty to begin and indeed on this basis, elected to proceed on the strength of only the alternative defence raised in paragraph 12 of their amended plea quoted above.

15. The principal issue on the pleadings was thus whether the entitlement of the plaintiffs to 37.% percent of the net proceeds available for distribution by the first defendant stood to be reduced by payment of the first defendant's debts which it alleged included the repayment of R2 118 589.46 to Tara on the strength of a loan account in the first defendant.

16. By the time the trial commenced, the parties had curtailed the issues in dispute further with the only issues before the Court whether in the first instance, the loan claim existed against the first defendant in favour of Tara and if so, in the second instance, the extent of that claim in monetary terms.

17. The plaintiffs accepted that before any of the net proceeds could be paid over,

provision would have to be made for any tax liability and accordingly only moved for an order holding that the plaintiffs are entitled to 37,5% of the net proceeds held in trust after payment of all or any amounts due to SARS together with costs.

18. The first and second defendants carried the onus of proof on both issues.

19. It is to the first issue that I turn.

20. The immovable property was mortgaged by the first defendant in favour of Nedbank in 2011. Blend Property Management *("**Blend**")* acted as a managing agent of the immovable property and was *inter alia* responsible for the collection of all rentals on behalf of the first defendant as well as the management of its monthly expenses including the servicing of the monthly payments to Nedbank.

21. At some point in January 2013, according to the evidence of McAllorum, the rental recoveries from tenants became erratic. There was insufficient rental collected on many occasions to meet the liabilities of the first defendant including its monthly bond repayments to Nedbank in terms of the mortgage bond.

22. The perilous financial positon of the first defendant was of some concern to its directors and McAllorum and the late Allan Dunne convened a meeting in January 2013 where it was agreed that Tara would advance funds to the first defendant so that it had sufficient funds available to meet its monthly shortfalls.

23. The plaintiffs did not challenge this evidence.

24. As correctly conceded by Mr Corbett SC for the plaintiffs during closing argument, the plaintiffs did not have evidence to disprove the existence of a loan agreement *per se*.

25. The resolution of the first defendant's board of 12 September 2013 signed by McAllorum and Dunne junior (and which recorded that it had previously been agreed by the board at its last meeting that a loan would be procured from Tara to fund the first defendant's ongoing operating expenses which would be secured by the immovable property with the loan to bear interest at the rate of prime plus

two percent per annum), established the existence of a loan agreement concluded between Tara and the first defendant, albeit that it was informally concluded. When the Court put to Mr Corbett SC that many businesspeople have since time immemorial concluded transactions in this informal manner he did not take issue with the proposition.

26. I therefore find in favour of the first and second defendants on the first issue.

27. The second issue is more vexed and requires an assessment of the evidence presented on behalf of the first and second defendants to establish the composition of the loan and how it was disbursed over the years so as to give rise to the sum of R2 118 589,46 pleaded in paragraph 12 of the amended plea as representing the value of the loan account. According to Mr Elliott the loan account stood at R2 640 171.00 as at 31 October 2021.

28. The first and second defendants presented the evidence of McAllorum and Brian Edwards in substantiation of the loan account.

29. McAllorum, who testified virtually from Ireland, lived in Ireland at all times and was not involved in the daily operations of the first defendant which were instead left to Blend and Dunne junior who came to live in South Africa after her father's death. When it was put to him that not a single document evidenced loan payments made to the first defendant, he responded that it could be proven very quickly. It however begs the question whether the evidence established precisely this.

30. McAllorum appeared not to possess direct knowledge concerning the actual disbursement of loan amounts by Tara to the first defendant as and when they were said to have been made. He lived abroad, and conceded that Blend was responsible for looking after the financial responsibilities of the first defendant on a daily basis with Dunne junior having been in direct contact with Blend regularly concerning these matters.

31. Blend was entrusted with responsibility of paying amounts over to the first defendant or to its creditors. For reasons that were not explained, no

representative from Blend was called to testify before Court on how Blend subsequently disbursed payments made to it, ostensibly for the benefit of the first defendant, nor did Dunne junior testify. When he was asked why the first defendant was never audited to verify the transactions said to constitute the loan by Tara, he deferred the question to Edwards.

32. The importance of hearing from Blend also stemmed from the fact that it was McAllorum's evidence that Blend collected all rentals on behalf of first defendant and paid the overheads of the company, including the mortgage bond payments. As I understood his evidence payments were made to Blend who then paid those over either to the first defendant or on its behalf. The documentary evidence however did not address how these payments were made and it could not be shown that they were made to the first defendant or paid to a third party creditor on its behalf.

33. According to him the directors had nothing to do with the management of the first defendant. The records of the company were maintained by Blend according to him and not its directors with the result that McAllorum himself could not speak confidently about the company's records.

34. He was not alone in this regard. The auditors had similar reservations.

35. While the first defendant relied on its financial statements in support of the loan from Tara, the same disclaimer exists on the part of the auditors in respect of every set of financial statements to the effect that:

> "The directors failed to keep appropriate accounting records. In these circumstances, I was unable to carry out the necessary audit procedure or to obtain all the information and explanations that I considered necessary to satisfy myself that proper records had been kept".

36. The evidential value to be attached to the financial statements is therefore minimal.

37. When McAllorum was requested to explain what happened to the first defendant's bank statements, he responded that those bank statements can be

disclosed and that he was not asked for it. No explanation was given as to why they were not tendered in evidence which would have addressed the issue more definitively. Presumably they were not discovered because they do not show payments from Tara to the first defendant.

38. He did not explain why the bank statements were not discovered by the first and the second defendant. He also did not explain why he would have had it, when according to his earlier evidence, Blend allegedly dealt with it, on behalf of the first defendant in South Africa.

39. When McAllorum was asked how he knew that Blend used all the amounts in question for the benefit of the first defendant, his response was that he spent a great deal of time on the phone with Blend. He alleged that the parties would not be here, had Nedbank foreclosed on the first defendant – these responses however did not prove the implementation of any loan agreement between Tara and the first defendant.

40. The argument is circular with respect since it does not follow that because Nedbank did not foreclose that Tara is the party who kept the first defendant's ship afloat, at least not in the absence of compelling evidence illustrative of payments made to or on behalf of the first defendant.

41. While he alleged that he did not have a problem to prove every rand that was paid, he did not proceed to prove the alleged payments by Tara, to the first defendant. When asked by not a single payment by Tara was made to the first defendant directly on the evidence presented, he responded that Blend dealt with the payments of the first defendant.

42. The probative value attached to his evidence is ultimately of low value, particularly if one considers his lack of personal knowledge regarding the role Blend performed in looking after the daily operations of the first defendant including its financial affairs and how it disbursed funds on behalf of the first defendant.

43. The upshot of this was that McAllorum lacked the requisite personal knowledge to establish the disbursement of loan amounts from Tara either to or for the benefit of the first defendant with the consequence that his evidence did not assist the first defendant in showing the existence of a loan account in favour of Tara in either the claimed amount or a lesser sum.

44. While the first and second defendants argued that the plaintiffs led no evidence to contradict the evidence of McAllorum that every payment by Tara was for the benefit of the first defendant, this brings into sharp focus whether his evidence established that fact.

45. For the reasons set out above the answer must be in the negative with the consequence that it did not matter whether the first plaintiff who was the only witness to testify on behalf of the plaintiffs had personal knowledge of these matters. The first and second defendants did not discharge the onus on them to establish a *prima facie* case that would then have required the plaintiffs to lead evidence in rebuttal. Nothing accordingly turns on the first plaintiff's absence of knowledge concerning these matters.

46. Edwards testified that the value of Tara's loan account in the first defendant was R2 640171.00 as at 31 October 2021. He explained the qualification to the financial statements on the basis that Blend was responsible for capturing all of the first defendant's records which went missing at some point which meant that an unqualified audit could not be expressed.

47. He did not prepare the financial statements himself and while he prepared a schedule of amounts which he said reflected the loan between Tara and the first defendant, this was based on second hand records extracted from the books of Blend, but which for the reasons set out above, did not evidence actual disbursements by Tara to the first defendant or on its behalf in more definitive terms. What those records he examined comprised was also not explained.

48. He accepted that he could not verify the correctness of the financial statements and in view of the fact that there was no direct evidence of loan payments made

by Tara to the first defendant, the evidence of Edwards too was limited in its value. One would have expected Blend who was the contemporaneous party responsible for the daily management of the first defendant's finances to offer its evidence, especially in view of the absence of records from its office. No explanation was given as to why these records could not have been reconstructed and tendered with corresponding oral evidence of a supplementary nature from Blend.

49. In the absence thereof I am unable to find that the first and second defendants have established that the first defendant is indebted to Tara in the sum of R2 142 684.90 either as alleged or at all.

50. For this reason I make an order in the following terms:

1. It is declared that the plaintiffs are entitled to 37,5% of the net proceeds held in trust by attorneys Cliffe Dekker Hofmeyr after payment of all or any amounts due to SARS.

2. It is ordered that payment of 37.5% of the net proceeds minus the deduction of all amounts due to SARS provided for in paragraph 1 above is to be made to the plaintiffs within ten (10) days of the final determination of the liability to SARS.

3. The first and second defendants are ordered to pay interest on the aforesaid amount 10.5% per annum *a tempore morae* from 6 February 2017 to date of final payment.

4. The first and second defendants are ordered to pay the plaintiffs' costs of suit, including all reserved costs orders and the costs of the interdict application in the Western Cape High Court, Cape Town under case number 24144/2016.

DATED ON THIS THE 26th DAY OF SEPTEMBER 2022

BESTER AJ

FOR THE PLAINTIFF: P CORBETT SC

INSTRUCTED BY: VAN RENSBURG & CO

FOR THE FIRST AND SECOND DEFENDANTS: G ELLIOT SC

INSTRUCTED BY: THOMSON WILKS ATTORNEYS

DATE OF JUDGMENT: 26 September 2022