REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No.: **5781/2010**

In the matter between:

C F BESTER N.O. First Applicant
GAIRONESA DAVIDS Second Applicant

and

ALLAN WILLIAM WRIGHT Respondent

and

Case No: **6671/2010**

In the matter between:

C F BESTER N.O. First Applicant
GAIRONESA DAVIDS Second Applicant

and

INA MOUTON Respondent

and

Case No: **6673/2010**

In the matter between:

C F BESTER N.O. First Applicant
GAIRONESA DAVIDS Second Applicant

and

CHARLES JACOB VAN GREUNEN Respondent

Judgment by	:	M J Fitzgerald, AJ
For the Applicants	:	Adv. J A van der Merwe
Instructed by	:	Mostert & Bosman 3rd Floor, MSP Chambers Cnr Carl Cronje Drive & Tyger Falls Boulevard, Tyger Falls BELLVILLE (Ref: H Botes/CLR/WF2038)
For the Respondents	:	Adv. P van der Berg
Instructed by	:	Jordaan, Van Wyk Stabilis Building 381 Main Road SEDGEFIELD (Ref: A Jordaan/W319)
Date(s) of Hearing	:	13 September 2010
Judgment delivered on	:	15 September 2010

Reportable

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No. 5781/2010

In the matter between:

C.F. BESTER N.O. First Applicant

GAIRONESA DAVIDS Second Applicant

and

ALLAN WILLIAM WRIGHT Respondent

and

Case No. 6671/2010

In the matter between:

C.F. BESTER N.O. First Applicant

GAIRONESA DAVIDS Second Applicant

and

INA MOUTON Respondent

and

Case No. : 6673/2010

In the matter between:

C.F. BESTER N.O. First Applicant

GAIRONESA DAVIDS Second Applicant

and

CHARLES JACOB VAN GREUNEN Respondent

JUDGMENT

FITZGERALD AJ:

In this judgment I deal concurrently with the relief sought against each of the respondents respectively under case numbers 5781/2010, 6671/2010 and 6674/2010.

Although in the notice of motion a rule nisi is sought counsel accepted that in effect the relief sought was final and the matter is to be adjudicated on that basis.

In each case that portion of an agreed loan of R1,66 million which was admittedly paid to each respondent in terms of written agreements of loan concluded on 5 August 2005 is claimed together with interest. The loan agreement in each case is annexed to the founding affidavit marked "CB5".

Although respondents in their respective answering affidavits initially contended that the agreement of loan was valid, alternatively if invalid that a portion of the claim asserted by the applicants had prescribed, the only defence persisted in before me is that the agreements concluded on 14 December 2007 and 7 May 2008 respectively, annexures "F" and "N" to the answering affidavit, have had the effect of, so it is contended, extinguishing the indebtedness of each respondent to Silver Moon Investments 80 (Pty) Limited ("the company").

The company was finally wound up by this court on 12 November 2008 and the applicants are its duly appointed liquidators.

According to the founding affidavit of the first applicant the company formed part of the Genesis Group of companies which, to the deponent's best knowledge and belief, had conducted business as property developers since about 2004. The developments were mainly financed by way of investments received from members of the general public who invested in the various developments undertaken by the Genesis Group.

The Genesis Group's structure comprised of Genesis Development Partners which company was registered and incorporated in accordance with the provisions of section 21 of the Companies Act No. 61 of 1973 as amended ("the Act"). Genesis Development Partners held all the issued shares in Genesis Property (Pty) Limited which in turn held all the issued shares in Genesis Property Holdings (Pty) Limited. The latter company held the issued shares in or controlled various separate companies which owned the land which was to be developed by the respective companies. Silver Moon was one of these companies.

As stated above, the application is resisted only on the basis that the agreements referred to above, annexures "F" and "N" to the answering affidavit, have had the effect of extinguishing the indebtedness of each respondent to the company.

The concessions made by the respondents in relation to the invalidity of the loan agreement itself and the defence of prescription were correctly made, in my view.

On the papers the loan agreement was clearly concluded in breach of section 226 of the Act and the claims have not prescribed, inter alia, because of the fact that the knowledge of the respondents qua directors of the company cannot be attributed to the company in circumstances where they acted against its interests and to its detriment (**see R v Kritzinger 1971 (2) SA 57 (A) at 59; NBS Bank Ltd v Cape Produce Company (Pty) Limited and Others 2002 (1) SA 396 (SCA) at 414; Klein NO v Kolosus Holdings Ltd 2003 (6) SA 198 (T) at 214**).

It is common cause that on 3 August 2005 the directors of the company resolved and approved a loan in the amount of R1,66 million to each of the respondents. Amounts less than the agreed amount of R1,66 million were admittedly received by each respondent in terms thereof.

The loan agreement, annexure "CB5" to the founding affidavit, provides in clause 4 thereof that **"the repayment of the loan and interest thereon will not be made to the company until such time as the Cedar Farm Development project is finalised".**

It is common cause that the Cedar Farm Development project was not finalised.

Respondents accept however in the event that it is found that no reliance can be placed upon the agreements concluded respectively on 14 December 2007 and 7 May 2008 that the amounts claimed in these proceedings are indeed due and payable.

This appears, inter alia, from paragraph 25.45 of the affidavit of Wright in case number 5781/2010 where he admits **"that in the event of the development for whatever reason not being completed that the loans would become payable on demand"**.

I now turn to consider each of the agreements, annexures "F" and "N" to the answering affidavit which, so it is contended, have the effect of extinguishing the liability on the parts of respondents to repay the loans admittedly made to them by the company.

In broad summary, annexure "F" provides for the purchase by the company and Cedar Falls Properties 30 (Pty) Limited ("Cedar Falls") of the 50 per cent shareholding held in each of them by various family trusts of the respondents.

In terms of clause 5 thereof, the purchaser (i.e. Cedar Falls and the company) purchased "**the shares and loan accounts (both in the name of the SELLER and the names of Alan William Wright, Charles Jacob van Greunen and Ina Mouton) as at the EFFECTIVE DATE together with all rights and obligations of whatsoever nature attaching to the SHARES and loan accounts to accrue to the Purchaser on and as from the EFFECTIVE DATE".**

The purchase price for such purchase, namely the amount of R837 506,00 was payable by "the purchaser" (i.e. the company and Cedar Falls) **"by way of registration of transfer of the property indicated in annexure "A" thereto".**

The purchase price was to be allocated **"in respect of the purchase of the shares as well as the loan account of the Seller in the Companies".** No provision was accordingly made for any allocation of the purchase price to the loan accounts of the respondents.

It is common cause that for practical reasons registration of the transfer of the contemplated property did not take place.

An issue which arises from the conclusion of this agreement is whether it complied with sections 85 and 87 of the Act.

Sections 85 et seq of the Act depart from the previously applied capital maintenance rule and permit a company in the circumstances there postulated to acquire its own shares.

These circumstances, in broad summary, relate to the solvency or otherwise of the company at the time of such purchase. **(See: Blackman et al Commentary on the Companies Act, vol 1 at para 5.40).**

It was not seriously disputed before me that at all material times the company was not solvent as contemplated by section 85(4). Indeed clause 10.3.3 of annexure "F" confirms such

insolvency in respect of investors. This clause reads:

"**On the Effective Date the Companies will not be in default in respect of any material obligation excluding current investors**" (my underlining).

Moreover, it is apparent from paragraph 77 of the replying affidavit that by December 2007, the liability of the company to investors was in excess of R42 million. The company, moreover, then had no assets other than the immovable properties which it had sold to Cedar Falls. It is, however, common cause that Cedar Falls never made the initial payment of R12 981 000,00 in terms of the relevant purchase agreement.

In the premises, it was accepted that the requirements postulated by section 85 and particularly 85(4) et seq of the Act were not satisfied, including the need for a special resolution authorizing the acquisition of shares as required by section 85(1). In regard to section 85(4) of the Act, it was held in **Capitex Bank Limited v Qorus Holdings 2003 (3) SA 302 (W) at 309C** that **"any payment made in contravention of section 85(4) would result in an illegality".**

Payment in this case was the transfer of the property. Counsel for the respondents sought to suggest that the provisions of section 86 of the Act somehow rendered legal an illegal payment in respect of an acquisition of shares in contravention of section 85(4).

I do not agree. Section 86 provides for the directors of a company who, contrary to the provisions of section 85(4), allow the company to acquire shares issued by it, to be jointly and severally liable to restore to the company any amount so paid and not otherwise recovered by the

company.

The provision of a further remedy against defaulting directors does not, in my view, render legal a payment otherwise said to be illegal because of non compliance with section 85(4) of the Act.

This did not, however, deter counsel for the respondents who, in reliance upon annexures "F" and " N", namely the agreements concluded on 14 December 2007 and 7 May 2008, contended that these agreements had been fully implemented and accordingly, because of **Wilken v Kohler 1913 AD 135** any invalidity relative to either or both of these agreements was irrelevant.

More particularly, with regard to **Wilken v Kohler**, **supra** counsel for the respondent referred to page 144 thereof where Innes JA stated as follows:

"But that argument surely loses sight of the distinction in principle between setting aside the result of an invalid agreement completely performed, and the enforcement of a term of such an agreement alleged to have been disregarded. It by no means follows that because a court cannot enforce a contract which the law says shall have no force, it would therefore be bound to upset the results of such a contract which the parties had carried through in accordance with its terms. No good ground of action could be alleged in such a case: neither in the shape of a *restitutio in integrum*, nor by way of *condictio* could relief be claimed. Neither party could say that he had been enriched at the expense of the other: and the *traditio* duly made with knowledge of all the facts and with the intent to pass *dominium*, and the price duly paid with similar knowledge and with the object of acquiring the *dominium* would bind the respective parties".

By reason of the view I take of this matter in relation to the effect of these agreements, it is probably unnecessary also to determine the effect of the alleged implementation of the agreements concluded b y the parties thereto on 14 December 2008 and 7 May 2008, annexures

"F" and "N" to the answering affidavit.

This is because I do not share the respondent's view about the effect of these agreements - irrespective of their implementation, namely that **"they extinguished the debts created by the loan agreement"**.

I do, however, also find, in any event, that the respondents' reliance upon the rule in **Wilken v Kohler** is misplaced. That rule finds justification for its existence in the consideration that where both parties have performed in accordance with the provisions of an agreement, albeit unenforceable, the purpose of the transaction has been achieved and that there is therefore no reason to interfere with the existing state of affairs. The underlying consideration of policy seems to be that those who received exactly what they bargained for should not be allowed to escape the consequences of a bad bargain by means of an enrichment action which is intended to be an equitable remedy (**see Legator McKenna Inc and Another v Shea and Others 2010 (1)SA 35 (SCA) at paragraph 28**).

Although this rule was expressly approved in **Legator McKenna supra**, the Supreme Court of Appeal made it clear that it cannot apply where the purpose of the transaction is prohibited by law insofar as the law cannot preserve a transaction which it has prohibited. It accordingly followed, so it was confirmed by the Supreme Court of Appeal at paragraph 29, that **"a defence based on that rule is not available against a claim brought under the *condictio ob turpem vel iniustam causam***".

The requirements for this latter *condictio* include the fact that the transfer of ownership must have taken place in terms of an illegal agreement, an agreement that is, the conclusion, performance or object of which is prohibited by law or is contrary to good morals or public policy (**see LAWSA: Second Edition, vol 9 at para 215; Robertson v Randfontein Estates Goldmining Company Ltd 1925 AD 173 at 204; Kroukamp v Buitendag 1981 (1) SA 606 (W) at 610**).

Given the apparent insolvency of the company and the admitted knowledge of the respondents that by at least December 2007 the company had experienced difficulties in paying its creditors - the applicants conversely and for cogent reasons, contend for a much earlier date and indeed aver that by 3 August 2005 the company "**was left with no liquidity to service its liabilities to the investors**" - it seems to me that in participating, qua directors, in transactions whereby the company, while insolvent and for no apparent benefit 'wrote off' its claims against them , the respondents acted in breach of their fiduciary duties towards the company (**see Robinson v Randfontein Estates Gold Mining Co Ltd supra at 192, 242; Cohen N.O. v Segal 1970 (3) SA 702 (W) at 706**). That the respondents indeed breached such duties was accepted by their counsel.

Indeed, to the extent that investors' money contributed for the specific purpose of the development of erven owed by the company was used not for that purpose but rather as a loan to its directors, such use may, in the circumstances that then prevailed also be said to constitute theft and/or a fraud upon the investors and creditors of the company (**see R v Gush 1934 AD 260 at 262; R v Solomon 1953 (4) SA 518 (A) at 522; S v De Jager and Another 1965 (2) SA 616**

(A) at 625B).

In these circumstances, where the conduct of the respondents is tainted, I consider that to relieve them of liability to the liquidators of the company in respect of the amounts so loaned to them on the basis of the rule in **Wilken v Kohler** is inappropriate and would in effect sanction their wrongful conduct.

It must, of course, also be borne in mind that the rule in **Wilken v Kohler** presupposes the situation where both parties have performed in accordance with the provisions of their agreement.

It is difficult to consider in what way the company has so performed. All that it did was become a party, first, to an unenforceable loan agreement and thereafter to a share buy back agreement in terms of which, vis-a-vis the respondents, it gave up for no benefit a substantial claim against its directors.

Given, moreover, the fact that the knowledge of its directors is not in the circumstances postulated, attributable to the company, it is difficult, in any event, to characterize its participation as proper performance.

I accordingly, in any event, find in the circumstances that it is not open to the respondents to rely upon the rule in **Wilken v Kohler**, which is, of course, an equitable remedy. To do so would, effectively, allow them to benefit from their own default. In the circumstances, they should not be allowed to do so to the ultimate prejudice of the investors and other creditors of the company.

I turn now more fully to deal with the contention that annexures "F" and "N" to the answering affidavit have the effect of extinguishing the indebtedness of the respondents to the company.

I point out first that in terms of annexure "F", the company and Cedar Falls purported to acquire the shares held in each of them by the Trusts.

Moreover, in terms of clause 7 thereof , the seller was to deliver to the purchaser, inter alia, a duly signed cession of all loan accounts of the seller (i.e. the trusts) in the company and Cedar Falls. No cession by the respondents of their personal loan accounts, if any, was required in terms of clause 7 or at all, notwithstanding the reference in clause 5 to the purchase as well of the loan accounts in the name of the respondents.

Annexures "L1" to" L4" to the answering affidavit do, however, record a purported cession by the respondents both qua trustees and in their personal capacities of **"all rights and obligations attached to any loan account in the company to the company"**.

It was, however in this regard, conceded by counsel for the respondents, correctly in my view, that the debit loan account of the respondents in the company could not be ceded in this way to the company.

In any event, I do not see how the so-called sale of shares agreement can have the effect of extinguishing the loan indebtedness of the respondents to the company. A mere perusal thereof, in my view, shows that this agreement does not, either expressly or tacitly, provide therefor.

Further, in my view, the reliance upon annexure "N" is equally misplaced.

In terms of this agreement, the company purported to sell to Proud Heritage Properties 146 (Pty) Limited ("Proud Heritage") the property described as Erf 22988 George.

Clauses 1.1, 1.2, 1.3 and 1.4 thereof refer, in turn, to the four agreements concluded on 14 December 2007 (including annexure "F") in terms of which the trusts sold their respective shareholding inter alia to the company.

Clauses 1.5, 1.6, 1.8 and 1.9 of annexure "N" read respectively as follows:

> **"1.5 And whereas the said companies, namely Cedar Falls, Spring Forest, Golden Rewards and Silver Moon are in terms of the agreements referred to in 1.1 to 1.4 collectively indebted to the Trust in the amount of R2 307 147,00.**
>
> **1.6 And whereas Silver Moon, Cedar Falls, Spring Forests and Golden Rewards in terms of this agreement hereby agree that Silver Moon assumes full liability for the due payment in terms of the agreements referred to in 1.1 to 1.4.**
>
> **1.8 And whereas the Trust ceded transfer in terms of a cession agreement their right, title and interest in and to the due payment for the shares sold as referred to in 1.1 to 1.4 to Proud Heritage. It is hereby agreed that Cedar Falls, Spring Forest, Golden Rewards and Silver Moon are not a party to the said cession agreement and the Trust and Proud Heritage being a party to the said cession agreement hereby indemnify Cedar Falls, Spring Forest, Golden Rewards and Silver Moon from any damages or loss that said companies may suffer due to any reason arising from said cession agreement".**

Payment of the purchase price payable by the company to Proud Heritage is regulated by clause 4.1 of annexure "N". This reads as follows:

> **"4. PAYMENT OF THE PURCHASE PRICE**
>
> **4.1 It is hereby agreed between Silver Moon and Proud Heritage that on date of registration of transfer of the property, the debts referred to in the preamble shall be set off the one against the other, both parties on such date releasing the other from due payment of such debts and neither shall have any liability towards the other for payment or for performing in terms of any obligation attaching to payment of the said amounts".**

A perusal of clause 4.1 makes it immediately clear, however, that it is only the debts referred to in the preamble which were to be set off, namely only those amounts payable to the trusts.

Nowhere in annexure "N" is there to be found any reference to the setting off or extinction of the debts owing by the respondents to the company in terms of their respective loan agreements.

This lacuna seems to have been appreciated by the respondents. By way of example, Wright in case no. 5781/2010 states in paragraph 25.29, albeit in reference to annexure "F", that it was the **"common intention understood by all the parties to annexures "F", "J" and "K" that in exchange for the Trust shares not only would the property referred to in annexure A to these agreements be transferred but also that the loans of Van Greunen, Mouton and myself in Silver Moon would be written off"**.

As stated above, notwithstanding this alleged common intention, I am not persuaded that the agreements relied upon by respondents have the effect for which they contend. This, in my view, is apparent from a proper construction thereof.

In any event, the applicants' response to paragraph 25.29 of the answering affidavit of Wright, referred to above, is instructive. More particularly, first applicant in paragraph 136 of his replying affidavit states as follows:

> **"136. The agreements were simply an attempt to give effect to their initial scheme of syphoning off investors' funds upfront, before the development of the properties had even commenced. By 'writing off' the loans, Silver Moon was simply further divesting itself of its assets, being the claims against the directors to the obvious detriment of its creditors".**

In this regard, it is common cause that the funds obtained by the company to effect payment to the respondents of the alleged loans emanated from funds invested by members of the general public in the company and/or Cedar Falls in the belief that the latter companies would develop the erven registered in the name of the company. The erven were, of course, not developed by the company.

Given that fact, it seems to me that funds so invested were not used for their intended purpose but were used, up front, and apparently in the expectation that the development would be profitable, to pay the respondents the alleged loans. As stated above, such use arguably constitutes theft and/or a fraud on the investors and other creditors of the company.

That the respondents were probably aware that the funds were not correctly applied arrears, appears inter alia from paragraph 12.5.10 of the answering affidavit of Wright where he states that it was explained to him **"that to regularise the payments they had to be reflected as loans to the four of us as directors of Silver Moon in the books of Silver Moon and the loans had to attract interest".**

In the circumstances, I am satisfied that the intention behind the loan agreement - and probably also the dominant purpose of annexures "F" and "N" to the answering affidavit - was that stated in paragraph 136 of the replying affidavit of first applicant, namely **"simply an attempt to give effect to the initial scheme of syphoning off investors' funds upfront, before the development of the properties had even commenced".**

In this regard I refer to the *dictum* of Hefer JA in **Erf 3183/1 Ladysmith (Pty) Limited and Another v CRI 1996 (3) SA 942 at 953B** where, the learned judge stated as follows:

"I have quoted the relevant passages from the leading cases in full in order to reveal the fundamental flaw in a submission which tinged the entire argument for the appellants. It is to the effect that, once it is found that the parties to the present agreements actually intended to structure their arrangement in the form of a lease coupled with a sub-lease and a building contract, there is really an end to the matter, because in that event effect must be given to each agreement according to its tenor. This is plainly not so. That the parties did indeed deliberately cast their arrangement in the form mentioned, must of course be accepted; that, after all, is what they had been advised to do. The real question is however, whether they actually intended that each agreement would *inter partes* have effect according to its tenor. If not, effect must be given to what the transaction really is".

In this regard, counsel for the respondents fairly conceded that a material aspect of annexures "F" and "N" was the attempt to relieve the respondents from liability in respect of their admitted loan account indebtedness.

In the premises, I am on this basis also disinclined to come to the assistance of the respondents given that the funds from which the loans emanated were intended to be used not for their personal benefit but rather for the development of the erven owned by the company. Indeed, the company received no benefit at all from the loan to its directors. Accordingly, and given the fact that the company was subsequently wound up without these erven being developed, it follows that the funds were inappropriately used by the respondents in breach of their fiduciary duties towards the company.

In light of the conclusions to which I have come I do not consider it necessary fully to deal with the further contentions asserted by the applicants to refute what is alleged to be the effect of the two agreements now relied upon by the respondents.

These include the contentions that:

1. the buy back agreement upon which the respondents rely in support of the contention that the debts were "written off", annexure "F" and the purported set-off or cession agreement, annexure "N" both sought to vary the terms of the loan agreement. Clauses 15.1 to 15.4 of the loan agreement provides that any amendment or variation thereof should be in writing and signed by both parties. No proof of compliance with these

clauses was adduced; and

2. the share buy back agreement, annexure "F" contained a suspensive condition to the effect that the purchaser also enter into sale of share agreements in respect of Spring Forest Trading 27 (Pty) Limited and Golden Rewards 240 (Pty) Limited on or before the signature date. Respondents have also not established that this condition was satisfied.

In the circumstances it follows that the relief sought by the applicants should be granted.

With regard to the question of costs, it was submitted by counsel for the applicants that the allegations in the affidavits of the respondents have been exposed as false in circumstances where each respondent must have known that the averments asserted by them were not true.

In the premises a special costs order is sought by the applicants.

Given that final relief is sought on the papers, I have attempted insofar as is possible to determine this matter on the basis of facts which are either common cause or appear *ex facie* the agreements relied upon by the respondents.

I cannot, fairly, in these circumstances make a definitive finding relative to the alleged falsity of the allegations made by the respondents in their respective answering affidavits.

It follows, in my view, that although the conduct of the respondents generally is worthy of censure, I cannot find, on the papers, that it merits a punitive costs order. I accordingly make the following orders:

1. **Case number 5781/2010**

   (a) Respondent is directed to pay to applicants the amount of R1 587 436,10.

   (b) Respondent is directed to pay interest on the aforesaid amount at the rate of 15.5 per cent a tempore

   (c) Respondent is directed to pay the costs of the application.

2. **Case Number 6673/2010**

   (a) Respondent is directed to pay the applicants the amount of R1 347 542,63.

   (b) The respondent is further directed to pay interest thereon at the rate of 15.5 per cent a tempore morae.

   (c) The respondent is directed to pay the cost of this application.

3. **Case No. 6671/2010**

(a) The respondent is directed to pay the applicants the amount of R1 287 542,63.

(b) The respondent is further directed to pay interest thereon at the rate of 15.5 per cent a tempore morae.

(c) The respondent is directed to pay the costs of this application.

4. In each case the orders as to costs will include the costs occasioned by the postponement of the application on 6 April 2010.

FITZGERALD AJ

15 September 2010