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

Case No: 4268/2008

In the matter between:

DINES CHANDRA MANILAL GIHWALA N.O.	**First Plaintiff**
GEORGE PAPADAKIS N.O.	**Second Plaintiff**
and	
HENDRIK ROELOF BAM	**Defendant**

JUDGMENT DELIVERED ON 23 MAY 2012

ALLIE, J

[1] The plaintiffs instituted action in their capacity as curators of Fidentia Holdings (Proprietary) Limited ("Holdings") formerly known as Brown Brothers Holdings (Reg. No. 2001/022355/07) and Fidentia Asset Management (Proprietary) Limited ("F A M"), having been appointed as curators on 1 February 2007.

[2] Plaintiffs' claim is for the return of the purchase price of shares held by defendant, which price was paid by the directors of Holdings illegally and in contravention of section 38 of the old Companies Act that was applicable at the time. The claim is one for enrichment, referred to as the *condictio ob turpem vel iniustam causam*. A further basis for the claim, is the allegation that the payment

for the shares were made from funds, which the defendant knew, belonged to investors whose investments were regulated by the Financial Institutions (Protection of Funds) Act, section 4 of which, provides that investor funds be kept separately in trust.

[3] The defendant appeared in person at the trial. Maddock and Koen both testified that they lied on oath in case no. 423/2006. The court will consider their testimony with caution in the light of their admitted dishonesty but to the extent that their evidence is supported by objective documentary evidence and the allegations of defendant both in this case and case no 423/2006, their evidence will be accepted as having corroboration.

[4] It is not disputed that Holdings and the defendant acquired FAM in January 2002 by the purchase of shares and the loan account in FAM , which at that time was held by Mr Warren. The purchase of FAM eventually had the result that defendant held 5% of the shares in Holdings and 40% of the shares in FAM and the remaining 60% of the shares in FAM were held by Holdings.

[5] Defendant paid no money for the shares as it was agreed that defendant would pay for the shares through the services he rendered. He would conduct the due diligence inquiry of FAM to ensure that it complied with the requirements of the Financial Services Board (" F S B") so that someone could be registered as a key individual who has the authority to invest funds on behalf of investors.

[6] Defendant applied to be that key individual but his application was rejected on 18 September 2003 on the basis that there were certain adverse findings made against him at the time when he was employed at the JSE.

[7] Defendant became a director of FAM which directorship only became effective on 1 June 2003 and on 11 August 2003, he had already resigned as a director of FAM.

[8] He resigned because the company's auditor, Mr Maddock, had become a director and he considered that to be a serious contravention of corporate law.

[9] Mr J.A.W. Brown only became a director of FAM on 16 January 2006.

[10] After his resignation as director, Defendant remained an employee of FAM and a director of Holdings. In September 2003, defendant took leave and when he returned in October 2003, he saw a facsimile stating that an investment made by TETA, an investor client of FAM, had been cashed in. He was concerned because he did not think that TETA had instructed FAM to sell the investment. Thinus De Jongh, who joined FAM, informed him that the investment, which was in the form of a promissory note, had been delivered but not sold.

[11] On the same day he arranged a consultation with his attorney. The next day he resigned from Holdings as a director and various negotiations took place

between his attorney and the Fidentia group that culminated in the agreement signed on 9 December 2003 in terms of which defendant sold his entire shareholding in FAM and Holdings to Koen for R8,5 000 000,00 plus tax incurred by defendant as a result of the sale of shares.

[12] The purchase price was payable in tranches and the last payment was made on 1 June 2004. Further payments were made to defendant for arrear interest and for the tax that the payment of the purchase price attracted. Holdings paid the purchase price on behalf of Koen. It was alleged by Koen in papers in a case no 423/2006, a case brought by Koen, Holdings and FAM against the defendant, that Holdings paid the money as partial repayment of the loan account he had with Holdings.

[13] In case no 423/ 2006, Koen, Holdings and FAM obtained a judgment on 22 November 2006 declaring that Holdings is the owner of the shares and directing that share certificates be issued in the name of the relevant applicant in that case. In *casu,* defendant raised the defence of res *judicata*, arguing that the issue of ownership of the shares had been decided by declaring the agreement of 9 December 2003 to be valid and enforceable and by deciding that the Holdings' payment of the purchase price of the shares did not amount to a contravention of section 38 of the old Companies Act that prohibits a company from providing financial assistance to a purchaser of its shares. In that case, defendant took the point that the financial records did not support the contention

that Koen had a loan account with Holdings and that the alleged sale of a business network by Koen to Holdings was contrived to conceal the contravention of section 38. The court found that the defendant had no more than an apprehension that section 38 was being contravened and he did not provide a plausible basis for that apprehension.

[14] The defendant raised a further special plea that R2 650 000,00 paid on 10 December 2003 has prescribed.

[15] Defendant submitted that the plaintiffs' claim should not succeed because of the *par delictum* rule as Holdings was not a company but a pyramid scheme where investors' money was used unlawfully.

[16] Mr Maddock the former auditor of the Fidentia Group and director of FAM and Holdings, testified that he was charged with fraud, theft and contraventions of certain provisions of the Financial Intelligence Centre Act No. 38 of 2001. He entered into a plea bargain agreement and was sentenced to seven years imprisonment. He was released on 26 November 2010.

[17] He explained that the group was under the control of Arthur Brown who took clients' funds and was instructed to invest them and provide the clients with the return. FAM would earn fees from the investments. The companies were all placed under curatorship in 2007.

[18] Initially FAM's bank account was used because it was not accessible through the internet and investor's funds were paid into the account of Maddock Incorporated, the auditing firm and into the account of Holdings.

[19] The FSB approved Mr De Jongh as the investment manager of FAM. FAM was approved by the FSB as a company that could invest funds on behalf of clients.

[20] Mr Maddock testified that the affidavit that he had deposed to, in case no. 423/2006 in which he confirmed the correctness of the allegations contained in Mr Koen's affidavit for that case, was false and he perjured himself. He also said that the loan account that Koen said he had with Holdings had been fictitiously created to conceal the contravention of section 38 of the old Companies Act. He also confirmed that defendant was paid the purchase price, interest and tax reimbursement from the bank account of Holdings which held investors' funds that were to be administered by FAM.

[21] Investors' funds were also used for the running of the company. The motor vehicles of the directors, including Mr Bam's, was paid with investors' funds held in Maddock's trust account.

[22] He agreed that Holdings had no investors but it received funds from the investors of FAM.

[23] Mr Koen testified that he was a director and shareholder of companies in the group including, Holdings.

[24] He said that at the time when he concluded the 9 December 2003 agreement with the defendant, he did not have the financial means to pay for the shares.

[25] He did not sell any business network to Holdings and did not have a real loan account with the company. His affidavits in case no. 423/2006 were false.

[26] Mr Bam, the defendant, testified that when he resigned from FAM, he did not resign from Holdings because it was not conducting any business.

[27] Defendant said that the weekend before he signed the sale of shares agreement, he went to his office at Fidentia, at the insistence of his wife, who suggested he gather some evidence of suspected wrongful conduct within the Fidentia group. He copied certain documents relating to Holdings and FAM.

[28] During cross examination, defendant denied that he knew by 9 December 2003, when he signed the agreement, that TETA money had been stolen. When confronted with his "whistle blowing" letter to the FSB dated September 2005, which refers to attached documents proving TETA's money was misappropriated by Fidentia, he said that he kept the documents that he

copied on 6-7 December 2003 in a box and did not look at them until April 2005 when Mr Warren asked a question concerning FAM.

[29] In his affidavit in case no 423/2006, defendant alleged he had a suspicion that the agreement for the sale of his shares contravened section 38 of the old Companies Act. When he copied documents of FAM and Holdings and kept them in a box for almost 2 years, he had a suspicion that the directors of the Fidentia group were committing fraud. Despite these suspicions, defendant continued to accept payment of the purchase price for his shares until June 2004 and payment of interest and reimbursement for tax thereafter. It was only after he received all the payments that he allegedly blew the whistle.

[30] Now defendant alleged, in this case, that he is not obliged to return those payments because the court found under case no. 423/2006, that there was no contravention of section 38.

[31] Defendant took issue with the allegation in paragraph 14 of the Particulars of Claim that FAM advanced money to Holdings. It was pointed out to him that the advance was in fact theft of the funds. Paragraphs 14.2, 14.3, 14.4 and 14.9 qualify the allegation of advances by alleging that they were illegal and were misappropriation of funds.

[32] He admitted that he alleged in his affidavit in case no. 423/2006, that some of the money used to pay him in the discharge of Koen's obligation, were not paid by Koen.

[33] Defendant explained that since FAM was not trading, there was no value to be placed on its shares at the time when he and Holdings purchased it but they paid R100 000 for it because it had a licence to be a Financial Service Provider.

[34] He confirmed that the price paid by Holdings for his shares were market value. What is not explained in the agreement nor in his evidence, is precisely how that market value was arrived at. It is common cause that FAM was only entitled to an administrative or investment manager's fee for each client that invested through it.

The defence of Res Judicata

[35] The onus is on the defendant to prove the following:

36.1 That the court that gave the previous judgment has jurisdiction;

36.2 That the case was between the same parties;

36.3 That the case was based on the same cause of action;

36.4 That the dispute that the court resolved concerned the same subject matter or thing;

[see: **Bafokeng Tribe v Impala Platinum Ltd 1999(3) SA 517 (B)**].

[36] The requirement that the case must be based on the same subject matter and be based on the same cause of action is not cast in stone. Those requirements may be applied less strictly to bring about a fair result.

[37] In **Janse Van Rensburg and Others NNO v Steenkamp and another and Janse Van Rensburg and Others NNO v Myburgh and others 2010 (1) SA 649 (SCA) at para 20** the court said the following:

[38] "The application of the principles of res judicata in the form of issue estoppel was discussed by Botha JA in Kommissaris van Binnelandse Inkomste v Absa Bank BPK 1995 (1) SA 653 (A) ([1995] 1 All SA 517 at 666D – 670C. This court affirmed that the source of the finding by Greenberg J in Boshoff v Union Government 1932 TPD 345 (that in order to uphold a defence of res judicata the cause of action need not be precisely the same in both actions) lay in our own common-law authorities rather than English law and that 'Voet's example' [concerning reliance on the actio redhibitoria and the actio quanti minoris as the same causes]

'and the acceptance by Greenberg J of a broader meaning of petendi causa both carry the necessary implication that for a defence of res judicata it is not an immutable that the same thing must be claimed". [My translation.]

[39] In *casu,* the case was not between the same parties as in case no. 423/2006, the applicants included Mr Koen and Holdings and FAM but the case was effectively brought by the directors of those companies acting on a frolic of their own without the knowledge and consent of all the shareholders and directors. In this case, the action is brought by the curators of FAM and Holdings only and do not include Mr Koen.

[40] A trustee does not acquire the right to sue from the insolvent, but from the Insolvency Act. [see: **Shokkos v Lampert NO 1963(3) SA 421 (WLD) at 426 G-H cited with approval in Swadif (Pty) Ltd v Dyke NO 1978 (1) SA 928 (A) at 945 B- E**].

[41] A trustee steps into the shoes of the insolvent in legally competent transactions but a trustee cannot be bound by transactions that are illegal or void. One example is voidable dispositions which a trustee can apply to have set aside because they have been made with the intent to defraud creditors or to prefer some creditors over others. [see: **LAWSA volume 9 paragraph 637**.] In instances of illegal transactions, the trustee or as in this case, the curators

cannot be said to be the same parties as the directors who purported to represent Holdings and FAM in the application brought under case no. 423/2006.

[42] The cause of action in this matter is that the agreement was unlawful and invalid because it contravened section 38. In case no 423/2006, the defendant raised a suspicion that the agreement may contravene section 38 and it could fall to be set aside leaving him with the obligation to repay what he had received, hence he did not want to sign transfer of the shares to the purchaser.

[43] The resolution of the dispute in case no 423/2006 did not require adjudication on the validity of the agreement as the judge in that case found that the respondent, (who is the defendant *in casu* did not put up a plausible basis for the allegation that he would be at risk as section 38 could be invoked. The cause of action in that case was whether Koen, Holdings and FAM were entitled to claim ownership in shares and the rectification of the share registers and to compel respondent (defendant) to sign the necessary transfer of shares forms. Although the court in that case recognized that the dispute arose from the terms of the agreement and although the court considered the argument advanced on behalf of the respondent in that case, that he was justified in refusing to transfer the shares to Koen because of the dictum in the case of **First National Bank of Southern Africa Ltd v Perry NO 2001 (3) SA 960 (SCA) at paras 24 -25,** a case that considered the *condictio ob turpem vel iniustam*, the court did not have

before it an allegation that section 38 was contravened, it was only alleged that respondent had a suspicion that there was a contravention.

[44] Although the defence raised by the defendant who was the respondent in case no 423/2006 concerning the contravention of section 38 is identical to one of the causes of action in *casu,* it was not considered on the facts before the judge in that case because of a paucity of evidence to support the allegation. Accordingly, the disputes in this case only partially concern the same subject matter but that subject matter was not fully canvassed and was accordingly rendered incapable of being adjudicated upon in the previous case. In case no 423/2006, the apprehension of respondent that section 38 was being contravened was found to lack plausible justification.

[45] *In casu,* the court has the benefit of considering defendant's apprehension in the previous case against the testimony of Maddock, Koen and the papers handed in as exhibits which reflect that there was no actual loan account that Koen had in Holdings and that he did not sell a Business Network to Holdings.

[46] I am of the view that as the parties in both cases are not the same nor are the causes of action the same, the defendant has not discharged his onus and the defence of *res judicata* must fail.

The defence of Prescription

[47] It is so that defendant received two payments totaling R2,650 000,00 on 10 December 2003. Ordinarily, a claim for the return of those payments would have prescribed on 9 December 2006 in terms of section 12 of the Prescription Act 68 of 1969. In terms of section 12(3) of the Act, the debt is not due for the purpose of prescription unless the creditor is aware of the circumstances that gave rise to the debt and of the identity of the debtor. Since the creditors *in casu* are the curators who were only appointed on 1 February 2007, two months after the claim would have prescribed, prescription could not have been interrupted by the provisional liquidation of Holdings and FAM. Knowledge of the directors acting contrary to the applicable laws and acting fraudulently cannot be imputed to the curators. [see: **Klein NO v Kolossus Holdings Ltd 2003(6) SA 198 (T); Connock's (SA) Motor Co Ltd v Sentraal Ko-operatiewe Maatskappy Bpk 1964 (2) SA 47(T) at 53 G-H; S v Smith 1985 (2) 70 (T); S v Van Denberg & Others 1979 (1) SA 208 (D); Price NO v Allied – JBS Building Society 1979 (2) SA 262 (E)**]

[48] The debt could only have become due for the purpose of prescription after 1 February 2007, once the curators became aware of the unlawful payments to defendants and accordingly could not have prescribed.

The *condictio ob turpem vel iniustam causam*

[49] The *condictio* relied upon by plaintiffs is one based on enrichment as a result of an illegal agreement where the obligations of the purchasers were fulfilled in an illegal manner with the knowledge of the seller(defendant).

[50] The *condictio* is available where one party performs on an illegal agreement and the party receiving the performance is aware that the manner of performance is illegal but proceeds to accept the performance tendered and that party was enriched unjustly as a result. [see: **First National Bank of Southern Africa Ltd v Perry NO 2001 (3) SA 960 (SCA) at para 24**].

[51] In Perry's case the court held that the *condictio* lies not only against a party who had knowledge of the illegality at the time when he received performance but also against a party who acquires that knowledge subsequent to receiving performance and at a time it is still in possession of that enrichment.

[52] While the defendant in *casu* assails the *condictio* on various bases, including denying that he had knowledge of the illegality or that the agreement is illegal or the performance was illegal, he does not deny that he still has possession of some or all of the proceeds of the sale of his shares to Koen.

[53] The crisp question is whether the knowledge and conduct of Brown, Maddock and Koen can be attributed to Holdings and FAM.

[54] Defendant testified that there were many senior people including directors that did not know what Brown, Koen, Maddock and others were doing in the Fidentia Group of companies with investors' funds.

[55] Cases in which the fraudulent conduct of directors cannot be imputed to the company are discussed here. In **Connock's (SA) Motor Co Ltd v Sentraal Westelike Ko-operatiewe Maatskappy Bpk 1964(2) SA 47 (T) at 53G-H** the court held as follows:

> *"It remains to add that where the representor is a company the knowledge of the relevant facts that is required is its actual or imputed, and not merely constructive, knowledge (Houghton & Co. Ltd. V. Nothard, Lowe & Wills, 1928 A.C. 1 at pp. 14-15, 18-19 and 33). That would, therefore, include the knowledge of any of its agents or servants possessed or acquired by him in the course of his employment under such circumstances and being of such a nature that it was his duty to communicate it to the proper authority in the company (Barberton Town Council v Ocean Accident & Guarantee Corporation Ltd., 1945 T.P.D. 306) unless that agent or servant is perpetrating a fraud on the company in relation to the matters of which he so possesses or acquires knowledge (R v Kritzinger, 1953 (2) P.H. H 109 (A.D); Houghton & Co. Ltd's case, supra; Halsbury, 3rd ed. vol. 6 p. 436)."*

[See also: **R v Kritzinger 1971 (2) SA 57 (A) at 59; NBS Bank Limited v Cape Produce Company (Pty) Ltd & others 2002 (1) SA 396 (SCA) at 414**.]

[56] In paragraph 49 of the founding affidavit in case no. 423/2006, Koen said the following: *"More particularly, at the time that the agreement was concluded the Fidentia Group consisted of 17 individuals and the Group was effectively owned by four individuals being myself, Maddock, Joseph Arthur Walter Brown and the respondent."*

[57] Since the evidence suggest that Maddock, Koen and Brown were aware of or perpetrated the theft of investor funds themselves, the knowledge of the directors or beneficial owners of the companies concerned, can be imputed to the companies.

[58] At the time when the payments were made to defendant, the unlawful action of paying defendant with investor funds may not have been known to him but on his own evidence he knew by April 2006 that there was theft of investor funds, yet he continues to refuse to return the money paid to him by Holdings on the basis that he denies that the agreement for the purchase and sale of his shares was illegal and that it's implementation did contravene section 38.

[59] Accordingly the payment of the amount claimed in the summons was made by Holdings to defendant in contravention of section 38 of the old Companies Act.

[60] The court also considered the evidence of Maddock and the papers that were handed in that show that the money paid by Holdings to defendant were money belonging to investors such as, TETA, whose money was stolen by the directors of FAM in contravention of section 2 of the Financial Institutions (Protection of Funds) Act. The funds used to pay defendant were clearly illegally obtained.

In par delicto rule

[61] Defendant argued that he may validly defend the *condictio ob turpem vel iniustam causam* by raising the principle that in *pari delicto potior est conditio possidentis*. To succeed, the defendant has to show that the plaintiffs were party to the illegality and accordingly *in delicto*.

[62] On the evidence of both plaintiff and defendant, it is clear that directors knew that the agreement contained an illegal provision, namely paragraph 2.5 and that implementation of the agreement by way of payment from the Fidentia companies would be a contravention of section 38, hence Maddock's creation of a sale of business network between Koen and Holdings. The fraudulent directors

of Holdings and FAM were accordingly *in delicto* but not the curators who took over the affairs of the companies subsequent to the liquidation.

[63] The defendant has not succeeded in proving that the plaintiffs are in delicto and the defence of in *pari delicto* accordingly fails.

Evaluation of Defendant's Submissions

[64] The defendant correctly pointed out that the evidence does not suggest that Holdings, FAM and Koen did not receive adequate value for the price paid to him and accordingly do not prove undue enrichment in the sense of having been impoverished at the expense of defendant in the sense of payment without a *causa* or without receiving value.

[65] What defendant conveniently ignores in his lack of enrichment argument, is the fact that as the *causa* was not a legally valid and binding one, the agreement and payments made in terms of it, fall to be set aside and returned to the curators.

[66] Defendant's conduct at the time when he was still employed within the Fidentia group, is irreconcilable with that of a scrupulously honest person who was conducting due diligence checks on FAM. As a person who has the requisite knowledge of how an Asset Management company that invests on behalf of

clients should conduct its financial affairs and administration, defendant's acceptance of an expensive vehicle at a time when FAM had not yet been able to generate sufficient fees to justify the expenditure associated with the purchase of many luxury vehicles is peculiar.

[67] Armed with the knowledge that the auditor of FAM had been appointed as a director and that that was a contravention of the Companies Act, defendant proceeded to resign from FAM but saw no red flags in Brown's behaviour to justify him resigning from Holdings as well. He in fact to remain as director in Holdings until he was assured that he would be compensated for his shares and remunerated for his services.

The sequestration application of defendant

[68] The costs of that aborted application stood over for the final determination in this case.

[69] Plaintiffs obtained a cost order against defendant when defendant's exception to plaintiff's particulars of claim was dismissed.

[70] Plaintiff's attempt to execute the costs order resulted in a *nulla bona* return. Plaintiffs accordingly sought the sequestration of defendant who paid the costs on the day that the sequestration application was to be heard.

[71] As the sequestration application was based on an act of insolvency, there can be no question that plaintiff's were entitled and indeed obliged to bring the application as they act in a fiduciary capacity *vis a vis* the creditors of Holdings and FAM.

[72] Plaintiffs are accordingly entitled to recover the costs of the sequestration application and since defendant elected to pay at the 11th hour, he has to bear the costs of that application.

IT IS ORDERED THAT:

1. Defendant shall pay plaintiffs the sum of R 9866 434,18;

2. Interest thereon at the rate of 15,5% per annum in terms of section 2A of the Prescribed Rate of Interest Act No. 55 of 1975 from date of service of the summons to date of payment;

3. Defendant shall pay plaintiffs' costs in the sequestration application ;

4. Defendant shall pay the costs of this action on a party and party basis;

5. Plaintiffs shall return the shares of defendant that he purported to sell to Koen in terms of the agreement dated 9 December 2003;

ALLIE, J