THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable

CASE NO: 608/2002

In the matter between :

L I GANES First Appellant

L G GANES Second Appellant

- and -

TELECOM NAMIBIA LIMITED Respondent

Before: **STREICHER, BRAND & CLOETE JJA**
Heard: **10 NOVEMBER 2003**
Delivered: **25 NOVEMBER 2003**
Summary: Insolvency – authority to institute proceedings – striking out of new matter in replying affidavit.

J U D G M E N T

STREICHER JA

STREICHER JA:

[1] This is an appeal against an order granted by Knoll J in the Cape of Good Hope Provincial Division in terms of which the joint estate of the appellants, who are married in community of property, was finally sequestrated.

[2] The first appellant was in the employ of the respondent as its Manager: Procurement from 1995 until 2 July 2000 when he resigned. In terms of a contract between the respondent and Dresselhaus Scrap Metal CC ('Dresselhaus') Dresselhaus was appointed as the exclusive purchaser of all respondent's scrap copper. The first appellant was, by virtue of his position as Manager: Procurement, responsible for the implementation and administration of the contract.

[3] On 12 July 2001 the respondent brought an urgent *ex parte* application for a sequestration order against the appellants. The founding affidavit was deposed to by one Gunther Hanke. He alleged that the joint estate of the appellants was insolvent. The appellants were, according to him, indebted to the respondent in at least the following amounts:

3.1 N$1 184 403,80 (it is common cause that N$1 equals R1) being a claim by the respondent against the appellants in respect of a loss suffered by the respondent as a result of the first appellant having deliberately under-invoiced Dresselhaus in respect of copper sales.

3.2 N$416 295,08 being a claim by the respondent against the appellants in respect of monies paid by the respondent to the Receiver of Revenue, Namibia.

3.3 N$37 748,20 being the balance due and owing by the first appellant to the respondent in respect of a housing subsidy over-paid in error by the respondent to the first appellant.

3.4 N$11 235,44 being the balance due and owing by the first appellant to the respondent in respect of a car allowance received by the first appellant while he was not entitled to such allowance.

3.5 N$1 800 000,00 being an amount owing to the respondent by the first appellant in respect of copper received by Dresselhaus but not invoiced by the first appellant.

[4] According to Hanke the MCW Trust, a trust controlled by the appellants, on 4 January 2001 purchased a Mercedes Benz CL 500 motor vehicle for a purchase price of R972 000 for the appellants' use. Hanke said that payments made by the first appellant in respect of the assets acquired by him must have come from a source other than his salary of approximately N$16 000 per month. He said, furthermore, that a trustee would be in a position to conduct an urgent investigation into the financial affairs of the appellants as it was evident that the first appellant 'was involved in a variety of unlawful and corrupt transactions giving rise to extensive unlawful "*commission*" payments to him'.

[5] The court *a quo* granted a provisional sequestration order and issued a rule *nisi* calling upon the appellants to show cause why a final sequestration order should not be granted. A provisional trustee was appointed and before delivery of the appellants' answering affidavit the appellants and their two children were, in terms of s 152 of the Insolvency Act 36 of 1936 ('the Act'), interrogated before a magistrate.

[6] In their answering affidavits the appellants did not refer to the interrogation in terms of s 152. The first appellant denied most of the instances of alleged under-invoicing and stated that to the extent that Dresselhaus was under-invoiced such under-invoicing was not intentional and did not cause any loss to the respondent. He denied, furthermore, that the respondent suffered any loss in respect of copper received by Dresselhaus and not invoiced by the first appellant. According to the first appellant his liabilities amounted to approximately N$923 848,52 and the value of his assets to R4 045 000 including R1 800 000 being the value of a 100% interest in Mintmark (Pty) Ltd. He, therefore, denied that he was insolvent.

[7] In regard to the discrepancy between the salary earned by the first appellant and the assets acquired by him the first appellant stated that his salary was not his only source of income but that he in addition thereto 'received certain payments from certain third parties in return for certain advices and in

the capacity as a consultant'. He denied that he had received any unlawful commissions.

[8] In the replying affidavit delivered by the respondent Hanke said that in the course of further investigations and the interrogation referred to it had emerged that the first appellant had substantial further claims against the appellants. He alleged that the first appellant, during the tenure and in the course of his employment with the respondent, in breach of his fiduciary duty to the respondent, 'received numerous secret and unauthorised payments in the nature of bribes and/or "commissions" from the following entities/persons with whom (respondent) was contracting from time to time in at least the following amounts':-

Dresselhaus Scrap CC / its member Mr Weakley	R 305 550,90
Global Telecom (Pty) Ltd / its director Mr Davies	R 742 426,74
Energy Procurement Services (Pty) Ltd ('EPS'), Rousant International, Aquick International	R1 253 185,00
Telephone Manufacturers of South Africa (Pty) Ltd ('Temsa')	R 445 955,06
	R2 747 117,70

[9] Documentary proof of these payments were annexed to the replying affidavit. Hanke stated that the first appellant admitted at the interrogation that he received between R600 000 and R700 000 from Dresselhaus or Weakley, in

excess of R1,5m from Global Telecom and approximately R1,7m from EPS, Rousant and Aquick ('hereinafter jointly referred to as "EPS"'); that certain of the payments were made to him in cash and were not deposited into any banking account; and that the payments were made to him to ensure his continued support for these concerns in their business dealings with the respondent. In regard to the appellants' assets the respondent said that the first appellant was the beneficial owner of only 50% of the shares in Mintmark (Pty) Ltd.

[10] The appellants thereupon delivered an application to strike out certain paragraphs in and annexures to the respondent's replying affidavit, more particularly the paragraphs and annexures dealing with the first appellant's admissions at the interrogation. The appellants contended that these paragraphs and annexures should be struck out on the ground that they constituted 'new matter and/or new causes of action'.

[11] On 23 October 2001 the matter came before Oosthuizen AJ. Two preliminary matters were argued, namely, the question whether the application for sequestration had been authorised by the respondent and the striking out application. Oosthuizen AJ held that there was sufficient proof that the proceedings were duly authorised and also dismissed the striking out application save in respect of one paragraph. In so far as the striking out application was dismissed he held that the relevant paragraphs and annexures did not constitute new matter in that the respondent was replying to the first appellant's denials

that he had accepted payment of unlawful and unauthorised commissions and that the acquisition of assets by him indicated irregular conduct on his part. He held, furthermore, that the material complained of did not constitute a new cause of action. He nevertheless proceeded to hold that, in any event, even if it were accepted that the material complained of constituted new matter he had a discretion to permit new matter in the replying papers. In the light of the fact that the material complained of were not known to the respondent when the founding papers were drawn he exercised his discretion in favour of the respondent and granted leave to the appellants to deal with the matter which the appellants wanted to have struck out.

[12] In his supplementary answering affidavit the first appellant did not deny that he gave the aforesaid evidence at the interrogation. However, he stated that he received only the payments in respect of which documentary proof was annexed to the replying affidavit. He gave no explanation for his evidence at the interrogation that some of the payments received by him were made in cash and said that the amounts mentioned by him at the interrogation were merely estimates. He stated that the payments received from Dresselhaus and Weakley were loans; that the payments received from Global Telecom were made to him in consequence of advice given by him to Global Telecom relating to business opportunities and in particular to wireless technology; and that the payments received from EPS were made to him ‘in consideration for consultancy services

(he) had rendered to EPS, affording them advice concerning business opportunities'.

[13] Temsa has at all material times been a supplier of payphones to the respondent and the first appellant was responsible for the administration of the relevant contracts. As regards the amount of R445 955,06 received from Temsa it appears from a reading of the supplementary replying affidavit and the reply thereto that the first appellant acquired a close corporation Lynco CC for the purpose of channelling money through this entity. A Mrs Helberg held the member's interest as the first appellant's nominee. An agreement was concluded between Temsa and Lynco in terms of which Lynco would pay 5% of the value of goods supplied by Temsa to any entity in any African state other than the Republic of South Africa. The contract for supply of goods by Temsa to respondent fell within the ambit of this agreement. The first appellant caused invoices in respect of the 5% commission payable to him by Temsa to be raised in the name of Lynco. A total amount of R445 955 was so received by Lynco in respect of goods supplied by Temsa to the respondent. After payment of administration expenses the amounts received from Temsa were paid to the first appellant except in one instance when it was on the instruction of the second appellant paid to a third party.

[14] According to the first appellant the agreement referred to was concluded in consideration for consulting services rendered by him to Temsa and in

particular for introducing Temsa to business opportunities in inter alia the Democratic Republic of Congo. At no stage did he promote Temsa to the respondent.

[15] The first appellant denied that the respondent was entitled to payment of the amounts received by him from Dresselhaus, Global Telecom, EPS and Temsa. He did, however, concede that he held a 50% and not a 100% interest in Mintmark (Pty) Ltd. It follows that on the appellants' own version their assets amounted to R4 045 000 less R900 000 i.e. R3 145 000.

[16] The court *a quo* found that in accepting these payments the first appellant acted in breach of a fiduciary duty owed by him to the respondent which rendered him liable to account to the respondent for the gain which accrued to him as a result thereof. It found, furthermore, that the first appellant's liability to the respondent in respect of such payments together with the other liabilities of the appellants exceeded the value of their assets and granted a final sequestration order against them.

[17] Upon application by the appellants the court *a quo* refused them leave to appeal against the finding by Oosthuizen AJ that there was sufficient proof that the proceedings were duly authorised; granted leave to the appellants to appeal to this court against the dismissal by Oosthuizen AJ of the striking out application; and granted leave to the appellants to appeal against the whole of its

judgment. In regard to the court *a quo*'s judgment the appellants contended that the court *a quo* erred in finding that their insolvency had been proved.

Authority to institute proceedings

[18] In their heads of argument the appellants asked that leave be granted to them to appeal against the finding by Oosthuizen AJ that the proceedings were duly authorised and that their delay in applying for such leave be condoned. They proffered no explanation for their delay in applying to this court for leave to appeal against that finding. In this regard the appellants relied on *S v Safatsa and Others* 1988 (1) SA 868 (A) where Botha JA said at 877C-F:

> 'If this Court is of the view that in a ground of appeal not covered by the terms of the leave granted there is sufficient merit to warrant the consideration of it, it will allow such a ground to be argued. This is well illustrated by the judgment of Schreiner ACJ in *R v Mpompotshe and Another* 1958 (4) SA 471 (A) at 472H - 473F. In my view, however, it requires to be emphasised that an appellant has no right to argue matters not covered by the terms of the leave granted. His only 'right' is to ask this Court to allow him to do so. In *Mpompotshe*'s case *supra*, Schreiner ACJ referred to "matters which this Court should think worthy of consideration", and to the power of the Court "to condone the delay and grant leave to appeal on wider grounds than those allowed by the trial Judge". A formal petition for leave to appeal on wider grounds is not an indispensable prerequisite, since the matter is before the Court whose members would be conversant with the record, but the remarks I have quoted show that the Court will certainly decline to hear argument on an additional ground of appeal if there is no reasonable prospect of success in respect of it.'

[19] There is no merit in the contention that Oosthuizen AJ erred in finding that the proceedings were duly authorised. In the founding affidavit filed on behalf of the respondent Hanke said that he was duly authorised to depose to the affidavit. In his answering affidavit the first appellant stated that he had no knowledge as to whether Hanke was duly authorised to depose to the founding affidavit on behalf of the respondent, that he did not admit that Hanke was so authorised and that he put the respondent to the proof thereof. In my view it is irrelevant whether Hanke had been authorised to depose to the founding affidavit. The deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof which must be authorised. In the present case the proceedings were instituted and prosecuted by a firm of attorneys purporting to act on behalf of the respondent. In an affidavit filed together with the notice of motion a Mr Kurz stated that he was a director in the firm of attorneys acting on behalf of the respondent and that such firm of attorneys was duly appointed to represent the respondent. That statement has not been challenged by the appellants. It must, therefore, be accepted that the institution of the proceedings were duly authorised. In any event, rule 7 provides a procedure to be followed by a respondent who wishes to challenge the authority of an attorney who instituted motion proceedings on behalf of an

applicant. The appellants did not avail themselves of the procedure so provided. (See *Eskom v Soweto City Council* 1992 (2) SA 703(W) at 705C-J.)

The striking out application

[20] Save in respect of an amount of R22 747,66 the court *a quo* did not find that the respondent's claim for loss suffered as a result of Dresselhaus having been under-invoiced or not having been invoiced, had been proved. The respondent did not contend that the court *a quo* erred in this regard. It contended that the court *a quo* correctly found that the appellants were insolvent as a result of the respondent's entitlement, as against the appellants, to payment of the aforesaid amounts received by the first appellant from Dresselhaus, Global Telecom, EPS and Temsa.

[21] To the extent that the respondent relies on the evidence contained in the replying affidavit as constituting evidence of additional liabilities by the appellants, rendering their joint estate insolvent, such evidence did constitute new matter as contended by the appellants. However, in terms of s 12(2) of the Act a court may on the return day of a provisional sequestration order, if not satisfied that the debtor is insolvent, require further proof of such insolvency. It follows logically that the court also have a discretion to allow such further proof in a replying affidavit, subject, of course, to the debtor being granted an opportunity to deal with the new matter. Whether, in particular circumstances, an application for sequestration should in terms of the section be dismissed or

whether further proof of insolvency should be allowed is a matter relating to the conduct of the business of the court hearing the application. In respect of such a matter 'different judicial officers, acting reasonably, could legitimately come to different conclusions on the same facts'[1]. In these circumstances there can be no doubt that the discretion conferred on the court by s 12 is a discretion which has been referred to as a discretion in the strict or narrow sense i.e. it is for the court hearing the application to decide whether or not to allow further proof. A court of appeal can only interfere if the court which heard the application exercised its discretion capriciously or upon a wrong principle, or has not brought its unbiased judgment to bear on the question or has not acted for substantial reasons.[2]

[22] The appellants did not make out a case for interference with Oosthuizen AJ's judgment on the aforesaid basis. Instead of doing so counsel for the appellants submitted that the material complained about should have been struck out for a number of reasons of which Oosthuizen AJ was unaware. Oosthuizen AJ can obviously not be held to have failed to exercise his discretion judicially on the basis of facts of which he was unaware. There is, therefore, no reason to

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[1] The words of Cloete J in *Bookworks (Pty) Ltd v Greater Johannesburg Transitional Metropolitan Council and Another* 1999 (4) SA 799 (W) at 806G.

[2] *R v Zackey* 1945 AD 505 at 511; *Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd ('Perskor')* 1992 (4) SA 791 (A) at 800C-G; and *Shepstone & Wylie and Others v Geyser NO* 1998 (3) SA 1036 (SCA) at 1044J – 1045F).

deal with the grounds upon which it was submitted that Oosthuizen AJ should have exercised his discretion in favour of the appellants.

Insolvency

[23] The first appellant did not deny that he testified at the interrogation that he received payments from Dresselhaus, Global Telecom and EPS to ensure his continued support for them in their business dealings with the respondent. He did not give an explanation for his evidence either. In the circumstances the reason given in his supplementary affidavit for these payments cannot be taken seriously and does not raise a genuine dispute of fact in this regard. The court *a quo*, therefore, correctly found that the payments admittedly received by the first appellant from Dresselhaus, Global Telecom and EPS were made to the first appellant to secure his support in their business relationship with the respondent. The appellants' counsel did not contend that the court *a quo* erred in this regard.

[24] On the appellants' own version the amount admittedly received via Lynco from Temsa was paid as a commission in respect of goods supplied by Temsa to the respondent.

[25] As an employee of the respondent and in the absence of an agreement to the contrary the first appellant owed the respondent a duty of good faith. This duty entailed that he was obliged not to work against the respondent's interests; not to place himself in a position where his interests conflicted with that of the respondent; not to make a secret profit at the expense of the respondent; and not

to receive from a third party a bribe, secret profit or commission in the course of or by means of his position as employee of the respondent.[3]

[26] The employer may claim from an employee any bribe, secret profit or commission received by him from a third party without the consent of the employer in the course of his employment or by means of his position as employee.[4] The English law is to the same effect. In *Chitty on Contracts* 28th ed vol 1 para 30-172 the English Law is stated thus:

> 'Where an agent receives from a third party a bribe, secret profit or commission in connection with his principal's affairs his principal is entitled to claim it; the same principle holds in regard to the relationship of employer and employee.'

[27] In the present case the first appellant breached his duty of good faith to the respondent. He took money from Dresselhaus, Global Telecom and EPS in return for looking after their interests in their dealings with the respondent whereas in terms of his employment contract with the respondent he was obliged to look after the respondent's interests. These payments clearly constituted bribes. Although the first appellant denied that he promoted the interests of Temsa in its business dealings with the respondent, the agreement to pay and the payment of commission to him in respect of payphones supplied to the respondent was likely to serve as an incentive to the first respondent to promote

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[3] *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 at 177; *Premier Medical & IndustrialEquipment(Pty)Ltd v Winkler and Another* 1971 (3) SA 866 (W) at 867H-877A; and *Uni-Erections v Continental Engineering Co Ltd* 1981 (1) SA 240 (W) at 252D-253F.

[4] *Transvaal Cold Storage Co Ltd v Palmer* 1904 TS 4 at 20-21 and 33-34; *Jones v East rand Extension Gold Mining Co Ltd* 1903 TH 325 at 335.

Temsa's interests in their dealings with the respondent. These payments, therefore, similarly constituted bribes received by the first appellant.

[28] Counsel for the appellants did not contend that the payments were not in the nature of bribes and that they were not received by the first appellant in breach of a duty of good faith to the respondent. In their heads of argument they submitted that even if it is accepted that the duty owed by an employee to an employer is a fiduciary one the employer may not claim payment from the employee of secret profits or commissions where these take the form of bribes. There is no merit in this contention and it was not advanced in oral argument before us. What was argued before us was that the payments received from Dresselhaus were in return for under-invoicing Dresselhaus, that the respondent did not suffer a loss in respect of such under-invoicing and that the amounts so received by the first appellant were, therefore, not recoverable.

[29] However, the appellants never contended in their affidavits that the payments received from Dresselhaus were received in return for under-invoicing Dresselhaus. But, in any event, the respondent's claim is not a claim for damages. Bribes or secret commissions received by an employee in the course of his employment or by means of his employment in breach of his fiduciary duty to the employer are deemed to have been received for his employer.[5]

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[5] *Transvaal Cold Storage Co Ltd v Palmer supra* at 20.

[30] It follows that the respondent has a valid claim against the first appellant for repayment of the amount of R2 747 117,70. In addition to that liability the appellants admitted liabilities in an amount of R1 057 131,18 which amount is made up as follows:

Fifty percent of respondent's claim	
referred to in para 3.2	N$208 147,54
Respondent's claim referred to in para 3.3	N$ 37 748,20
Respondent's claim referred to in para 3.4	N$ 11 235,44
Sundry loan creditors	N$800 000,00

These liabilities exceed the appellants' assets by more than R650 000. It follows that the appellants are insolvent.

Conclusion

[31] The appeal is dismissed with costs.

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STREICHER JA

BRAND JA)
CLOETE JA) CONCUR