

/SG
IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

DATE: 04/04/2008
CASE NO: 50444/2007

UNREPORTABLE

In the matter between:

THE BODY CORPORATE OF FUCIA GARDENS	1 ST APPLICANT
THE BODY CORPORATE OF LANCELOT	2 ND APPLICANT
THE BODY CORPORATE OF MELBROEK CREST	3 RD APPLICANT
THE BODY CORPORATE OF BOUWERSHAVEN	4 TH APPLICANT
THE BODY CORPORATE OF HENOPSPRIDE	5 TH APPLICANT
THE BODY CORPORATE OF MEADOWDALE	6 TH APPLICANT
THE BODY CORPORATE OF IMPALAPARK	7 TH APPLICANT
THE BODY CORPORATE OF KASSHANE	8 TH APPLICANT
THE BODY CORPORATE OF TROCADERO	9 TH APPLICANT

THE HOME OWNERS ASSOCIATION OF COUNTRY LANE	10 TH APPLICANT
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THE HOME OWNERS ASSOCIATION OF ELDOSEC	11 TH APPLICANT
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WATERKLOOF RIDGE ESTATE HOME OWNERS ASSOCIATION	12 TH APPLICANT
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And

BAKENKOP (PTY) LTD t/a WIERDA EIENDOMSDIENSTE (IN LIKWIDASIE)	1 ST RESPONDENT
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THEUNIS CORNELIUS MULLER N.O.	2 ND RESPONDENT
ITUMELENG BRENDA MOHALE N.O.	3 RD RESPONDENT
BEATRIX ELIZE GROENEWALD N.O.	4 TH RESPONDENT
ESTATE AGENCY AFFAIRS BOARD	5 TH RESPONDENT

JUDGMENT

MAKHAFOLA, AJ

[1] Twelve applicants have launched an application whereby they seek an order compelling the second, third and fourth respondents as duly appointed joint liquidators of the insolvent first respondent to pay them the amounts of monies specified in annexure "G" annexed to the application. The first respondent was liquidated on 3 July 2007 in this court by an order attached to the application as annexure "D".

[2] Relief sought by the applicants is in the following from:

"1. Dat die 2de, 3de en 4de Respondente, in hul hoedanighede as behoorlik aangestelde likwidateurs van die 1ste Respondent, gelas word om die gelde van die Applikante soos uiteengesit in Aansoek 'G' hiertoe, en wat gehou word in die bankrekening van insolvente boedel van die 1ste Respondent, onmiddellik aan die Applikante oor te betaal;

2. Dat die gelde, soos verwys na in bedede 1, betaal word in die trustrekening van Liesl van Rensburg Prokureurs te Absa Bank Beperk, Hatfield tak, Tak kode: 632-005, Rekeningnommer: 406 590 4578;

3. In die alternatief tot bede 1, dat die regshulp uiteengesit in bede 1 as tussentydse regshulp met onmiddelijke werking hangende die instel van 'n aksie waarin finale regshulp gevorder word;
4. Dat die insolvente boedel van die 1ste Respondent gelas word om die koste van hierdie aansoek te betaal;
5. Verdere en/of alternatiewe regshulp.”

Common Cause Facts

- [3] The following factors are common cause between the applicants and the first to the fourth respondents.
- (a) The applicants and the first respondent concluded a management agreement in terms of which the first respondent would collect the levies on behalf of various applicants;
 - (b) The first respondent, in terms of the management agreement, was instructed to collect the levies and deposit the monies into a banking account in the name of the various applicants;
 - (c) The levies the first respondent would collect on behalf of the various applicants are trust monies;

- (d) The first respondent did not deal with its affairs regularly and legitimately, and the first respondent's business was conducted fraudulently and recklessly;
- (e) The first respondent acted as a managing agent and was an estate agent.

Issue in Dispute

- [4] The main issue in dispute gleaned from the affidavits and the agreements is: the monies collected by the first respondent prior to its liquidation are trust monies or monies belonging to its business account.
- [5] Should the court find that the said monies so collected are trust monies then the application must succeed. But should the contrary be found to be the position then the application must fail.

The Applicants' Case

- [6] In summary form the applicants aver that the first respondent was by law to open a trust account in order to deposit monies collected on their behalf. That was not done. Instead, the monies so collected were deposited by the manager of the first respondent into the first respondent's business account. They aver further that in terms of annexure "G" each applicant has identified the amount owed to it by

the first respondent, and they request the court to order payments to them.

- [7] The applicants further state that they have no other remedy available to them because they have done all they could that they be paid. The monies they claim do not form part of the first respondent's insolvent estate. If they were to claim the insolvent estate in terms of section 336 of the Company's Act, then they would become concurrent creditors which they are not. They now, approach this court for a relief.

The First, Second, Third and Fourth Respondents' Case

- [8] The first respondent has administered to other body cooperates totalling 243 all over Pretoria. Apart from the twelve applicants there are other interested parties who are owed amounts of money by the first respondent which had performed similar duties to them.
- [9] The first respondent did not use a trust account as obliged by the law. The monies it received on behalf of all the body cooperates were banked into its business account.
- [10] According to the respondents monies which are in the bank account of the first respondent cannot be termed trust money because they are not in a trust account and were never deposited in a trust account. The applicants may have a claim against the insolvent first respondent, and just like other body cooperates have concurrent claims. The

applicants have become creditors who must compete with other creditors and should attend the prescribed meetings of creditors to prove their claims.

[11] If the second, third and fourth respondents are ordered to pay to the applicants the monies claimed, that will prejudice other body cooperates and/or creditors who are in the same position as the applicants. Moreover, the free residue will be substantially reduced if the applicants are paid now. That may also amount to preferential treatment of the applicants which they should not enjoy if the normal course of events is allowed to evolve.

[12] The first respondent failed to deal with its affairs legitimately and regularly. The funds of the first respondent were deposited into its bank account but were subsequently used and abused freely at will by one Mr Cruickshank who at a certain period controlled it.

[13] The City Council of Tshwane is owed about R10 million. There exists a colossal shortfall because of the misappropriation of funds by Mr Cruickshank who had committed suicide during September 2006.

[14] Such funds as claimed by the applicants form part of the insolvent estate of the first respondent and should be dealt with in terms of the Company's Act and the Insolvency Act. According to them monies

claimed by the applicants are not identifiable as they had become a *commixtio* and have formed part of other funds in the account.

The Law

[15] Estate Agency Affairs Act 112 of 1976 section 1 provides a definition of trust money as:

“‘TRUST MONEY’ means –

- (a) Money or other property entrusted to an estate agent in his or her capacity as an estate agent.

- (b) Money collected or received by an estate agent and payable in respect of or on account of any act referred to in subparagraphs (i), (ii), (iii) or (iv) of paragraph (a) of the definition of estate agent.”

[16] Section 32(1) of the Estate Agent Act provides the following:

“Every estate agent shall open and keep one or more separate trust accounts, which shall contain a reference to this section; with a bank and such estate agent or his or her employee, as the case may be, shall forthwith deposit there in all trust money held or received by or on behalf of such estate agent and the name of such bank and the number of each such trust accounts shall forthwith be notified to the Board.”

[17] Section 32(2)(a) of the Estate Agent Act provides that:

“Notwithstanding the provisions of (1), any estate agent may invest in a separate savings or other interest bearing account opened by him with any bank, building society or any institution or class of institution designated by notice in the Gazette by the Minister in consultation with the Minister of Finance, any monies deposited in his trust account which are not immediately required for any particular purpose.”

[18] Section 32(8) of the Estate Agency Act provides as follows:

“The amount standing to credit of the trust, savings or other interest bearing account, referred to in (2)(a), of any estate agent, shall not form part of the assets of such estate agent or, if he was a natural person and has died or has become insolvent, of his deceased or insolvent estate.”

[19] In *S v Kotze* 1965 1 SA 118 (AD) 124B the following is stated:

“It must be born in mind that, under our modern system of banking and paying by cheque or kindred process, the question of ownership in specific coins no longer arises in cases where resort to that system is made. Even if an agent receives

currency on behalf of a principal, there is ordinarily no obligation on him to hand over the notes or coins received by him to his principal. Nevertheless, it is trite law that this is trust money and that if he does not pay over to his principal what he has received (in the absence of a set-off or other valid reason) and uses the fund for his own purpose, he is guilty of theft.”

[20] In *Fred Packerman’s Properties v Estate Agents Board* 1980 3 SA 451 (CPD) 459H-460 it is stated:

“Once, however, the money merges with other funds and is no longer identifiable, although a temporary interdict against the total holding may be granted in certain circumstances.”

[21] In *Stern and Ruskin NO v Appleson* 1951 3 SA 800 (W) 811A it is stated that:

“There is no evidence here that any money in the possession of the respondent is identifiable or earmarked as partnership money.”

And at 811D quoting *Story’s Equity Jurisprudence* the following appears:

“... the whole will be taken in law and in equity to be the property of the principal until the agent puts the subject matter under such circumstances that it may be distinguished as satisfactorily as it might have been before the unauthorised mixture on his part.”

Evaluation

[22] On 1 December 2006 the first applicant entered into a “Bestuurooreenkoms” whereby it was agreed that the first respondent would perform its duties in terms of clause 2 and its subparagraphs. Of relevance, as it will later become clear, is the issue of paragraph 2.1.2 which relates directly to the question of facts and the Estate Agency Affairs Act dealing with the main issue in dispute.

[23] It is clear that per agreement the moneys collected by the first respondent was intended to be trust money. This money which was never deposited into any trust account because no such account was ever opened does not change its complexion for the mere fact that it was deposited into a business account. The intention of the moneys being trust-money is also still in place notwithstanding the default by the Estate Agent.

Application of the Law

[24] I do not need to look beyond section 32(8) of the Act because this is the provision of the law. It requires the court to act in terms of it in

situations as this one in issue, unless there is any other law that provides otherwise. “The assets shall not form part of such estate agent”, needs to be interpreted in the ordinary meaning of words. They mean what they say. The true nature of the funds, I consider, is not altered by the fact that they were not deposited into the trust account. In terms of case law this mixture is unauthorised. And *in casu*, the merger of the monies in the account of the first respondent cannot be taken to be that of the first respondent especially because the applicants have identified the said funds in annexure “G” as what belongs to them.

Order

[25] Consequently, the application is granted in terms of prayers 1, 2, 3 and 4 of the notice of motion.

K MAKHAFOLA
ACTING JUDGE OF THE HIGH COURT

50444/2007

Heard on:

For the Appellant: Adv

Instructed by: Messrs

For the Respondent: Adv

Instructed by: Messrs

Date of Judgment: