REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 28479/2013
APPEAL CASE NO: A5063/2014

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

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DATE SIGNATURE

In the matter between:

SALISTER DIESELS (PTY) LTD
(in liquidation) First Appellant
(First Applicant in court *a quo*)

CLIFFORD THABANG MAREDI N.O. Second Appellant
(Second Applicant in court *a quo*)

KGASHANE CHRISTOPHER MONYELA N.O. Third Appellant
(Third Applicant in court *a quo*)

And

INDUSTRIAL DEVELOPMENT CORPORATION
OF SOUTH AFRICA First Respondent
(First Respondent in court *a quo*)

AFRICA RESOURCES LIMITED Second Respondent
(Second Respondent in court *a quo*)

J U D G M E N T

LAMONT, J:

[1] For the sake of convenience the appellants are collectively referred to as the insolvent, the first respondent as IDC and the second respondent as the financier.

[2] During 2010 the insolvent was indebted to IDC in respect of various monies lent and advanced to it (some R5,7 million). IDC held various securities as security for the said indebtedness and had perfected its security as the insolvent had defaulted.

[3] The insolvent sought to renew its credit facilities. IDC required the insolvent to settle the indebtedness to it prior to it considering funding the insolvent afresh pursuant to a new application which it required the insolvent to make.

[4] On 31 March 2010 the financier wrote a letter to IDC offering to purchase from it the debt due by the insolvent to it. In the letter the financier indicated that the proposal was that "*all the rights attached to your loans be transferred to* [the financier] *as the purchaser*".

[5] It was apparent that what the financier was proposing was that IDC cede the loan amount to it together with the rights of IDC to the security which IDC held in respect of the loan. In the letter the financier indicated that it was aware that the insolvent at that time was already in breach of its loan agreement to IDC and that it was not in a position to settle the secured obligation without the assistance of the financier.

[6] The problem and its urgency related as can be inferred from the letter to the fact that the insolvent had pledged all of its plant, equipment, debtors and stock as well as certain shares to IDC. In addition it had provided two surety mortgaged bonds by a company over certain immovable properties. The continued operations of the insolvent required it to be able to use the articles pledged. From the same letter it appears *"to continue operations of the company in order to guarantee that your loans are settled …*" and "*Without the liquidation … all the secured assets are pledged to IDC and can only be released after the settlement of your claim*".

[7] The purpose of the proposed contract was to obtain the release of the securities which had been given to IDC. In order to obtain that release the indebtedness of the insolvent to IDC needed to be settled.

[8] On 1 April 2010 IDC provided the insolvent with the settlement figures for the insolvent's indebtedness. These settlement figures were provided on the basis that payment be made by the insolvent on or before 12 April 2010.

[9] A material part of any proposed transaction necessarily involved the transfer of the securities as against the payment and/or mechanism by which IDC would cease to be a creditor. The entire transaction was geared to achieving this end. There was no purpose in the debt being settled unless the securities were released.

[10] The original suggestion of the financier was that it purchase the debt from IDC and that the security be transferred to it. If this occurred the financier would obtain a real right to the security. IDC wrote to the financier suggesting an alternative which it considered might be quicker namely that the financier provide a loan to the insolvent to settle the indebtedness in full and take over the securities from the insolvent once they had been released by IDC.

[11] This suggestion contemplates a loan by the financier to the insolvent, the release of the security to the insolvent and then the transfer of the security to the financier. This suggestion does not make commercial sense in that it provides for a loan to be made in advance of the security being provided for the loan. The financier would not obtain a real right in the securities but would have only a personal right against the insolvent to enforce its contractual rights. In addition once the loan had been made difficulties could arise as the insolvent could refuse to provide the security to the financier; if the insolvent did provide the security after the loan had been made the security would constitute an undue preference in the financier's hands. These issues were probably in the mind of the financier as the financier was aware of the fragile

position of the insolvent. It is improbable that the financier would advance money to the insolvent otherwise than as against the simultaneous transfer of the security to it.

[12] The financier on 12 April 2010 wrote a letter to IDC stating:

> "*Find attached … the proof of payment for the settlement amount for* [the insolvent] *loan. We will go for option 2 and* [the insolvent] *has been informed to send the instruction letter to you so that IDC can release the security to* [the financier]."

[13] It is apparent from the letter that the money was being paid to IDC by the financier on the basis that the security was to be transferred directly to the financier by IDC. Although the letter states that option 2 is being pursued by the financier it is apparent from the writing that the financier was requiring the simultaneous payment and transfer of security.

[14] There is no other evidence as to what the contract was between the insolvent and the financier. There is no evidence by any person who concluded the contract and no other documentary evidence. The letters written by the financier to IDC and by the insolvent to IDC are no more than evidence of performance of some contract whose terms are to be identified by the court by reference only to the letters.

[15] The deponent to the affidavit filed on behalf of the insolvent was not a party to the contract and infers from the terms of the letter what the contract was. In paragraph 22 he states:

> "*It is clear from …* [the e-mail] *… and the fact that payment was made on … that the financier elected to follow the alternative cause of action* [referred to as "*option 2*"] *… namely that the second respondent provided a loan to the first applicant to settle the first respondent in full otherwise the information requested … would have had to be provided and the first respondent's credit committee would have had to give approval …*"

[16] It is extremely undesirable for a court to try to interpret a contract and ascertain its terms by reference to documents only. The documents do not purport to record the terms of the contract. They are letters written by various parties to the contract which accompany acts taken in relation to performance. In addition there is no writing between the insolvent and the financier. We are asked to interpret the terms of a contract between the financier and IDC which was not party to the loan contract. The only role the IDC would play would be to attend to the release of the securities.

[17] IDC however had an interest in the transaction. It did not want to be put in a position where it would be obliged to accept a payment from its debtor and be forced to release securities it held until it was sure that the payment was not impeachable. It would also not want to accept the payment until it was in a position to release securities it held. Probably IDC accordingly would not accept payment from its debtor until it had conducted investigations and also if it wished to accept payment made arrangements to release the securities. In my view at best for the insolvent the inference cannot be drawn from the facts for the reasons set out above and at worst for the insolvent the probabilities do not favour the inference selected by the insolvent's deponent.

[18] The financier made payment to IDC on 12 April 2010. IDC did not receive the payment as a payment being made to the insolvent. IDC instead held the monies paid in an account which it created. As at 19 April 2010 IDC retained the money in that account. IDC wrote to the financier stating:

> "*We are still waiting for the securities to be released … and the account to be cleared … after which the securities will be sent through to* [the financier]."

[19] Subsequently on 23 June 2010 IDC indicated to the financier that on 9 April 2010 the insolvent had required IDC to render an invoice to the financier for the settlement amount reflecting the debt due by the insolvent to IDC. The letter recorded that the financier had opted unilaterally to effect electronic payment of the settlement figure to IDC. IDC then set out various grounds reflecting the fragility of the insolvent and indicated in the letter that it refused to relinquish its rights to the securities it held and also refused to allocate the payment towards settlement of the insolvent's account and would retain same in an interest-bearing account pending resolution of the dispute.

[20] It is apparent from the letter that IDC refused to accept the payment made by the financier as being a payment to the insolvent.

[21] IDC was entitled to adopt this attitude as payment is a bilateral act. While parties to a debt discharging transaction could agree to any means of discharge the absence of agreement to the contrary cooperation is required. The payee is required to acquire unfettered and unrestricted rights to the

funds in question failing which the payment is inchoate. See *Vereins-Und West Bank AG v Veren Investments and Others* 2002 (4) SA 421 (SCA).

[22] As the person to whom payment was made refused to accept the payment no payment was made. The way in which payment would be made to insolvent was by way of payment being made to IDC. Absent payment to IDC absent payment to the insolvent. Accordingly no payment was made to the insolvent.

[23] Hence the monies held by IDC constitute an asset in the hands of the financier. The monies held by IDC accordingly fall to be repaid to the financier.

[24] I find that the contract between the insolvent and the financier probably contained a term that the monies would only be advanced to it against release of the securities:-

1. IDC was entitled to and did refuse to accept the payment as a payment of the insolvent.
2. The monies were neither advanced to nor received by the insolvent.

[25] In my view the appeal should be dismissed with costs including the costs consequent upon the employ of senior counsel.

[26] I would make the following order:

1. The appeal is dismissed.

2. The appellants are to pay the costs of the appeal including the costs consequent upon the employ of senior counsel.

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C G LAMONT
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION

I agree

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MA HAWYES
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION

MATOJANE J (Dissenting)

[1] I have read the judgment of Lamont J and regret for the reasons set forth below, that I am unable to agree therewith.

[2] At issue in this appeal is the question whether an amount of R5 757 364,56 held by the IDC belongs to Salister or Africa Resources. This in turn depends on the agreement in terms of which the funds were paid to the IDC.

[3] It is common cause that Salister was indebted to IDC in the respect of

credit facilities and/or loan accounts granted by the IDC to Salister. The IDC held various securities for Salister's indebtedness.

[4] During January 2010 Salister approached the IDC for a renewal of its credit facility. During March 2010 it was agreed between Salister and the IDC that Salister would settle its indebtedness and then make a fresh Application for funding.

[5] Salister which was then known as Africa Heritage PowerSolutions, made a request for settlement figures from the IDC, whereupon the IDC provided details of Salister's indebtedness in writing.

[6] On 31 March 2010 Africa Resources submitted a written offer to the IDC to purchase all the outstanding loans between IDC and Salister in return for the release of all securities held by IDC to Africa Resources.

[7] On 8 April 2010 the settlement figures were provided to Salister by the IDC.

[8] On 9 April 2010 the IDC addressed an e-mail to Africa Resources Limited advising as follows:

> "Kindly provide us with the following information:
>
> 1. A sale and purchase agreement entered into between Salister and African Resources Limited for the IDC loans.

2. A letter from Salister to IDC confirming that African Resources will settle the IDC in full and that all securities held by IDC should be released to Africa Resources once the loan is settled in full.

Once we have received and evaluated the documents, we will require approval from credit committee before proceeding with your request.

We understand that there is some urgency to conclude the matter, and request that we be given a week or 2 to obtain the necessary approvals,

Alternatively, in order to speed up the process, Africa Resources can provide a loan to Salister to settle the IDC in full and take over securities from Salister once this has been released by the IDC. This will not require approval from IDC.

[12] Africa Resources responded to the e-mail referred to above on 12 April 2010 as follows:

> "Find attached is the proof of payment for the settlement amount for Africa Heritage Power Solution's loan. We will go for option 2 and to Africa Heritage Power Solutions has been informed to send the instructions letter to you so that IDC can release the security to African Resources Limited"

[13] On 12 April 2010 Africa Resources paid the amount of R5 757 364,54 directly to the IDC. This payment was made in accordance with "*option 2"*.

[14] On the 13 April 2010 Salister wrote a letter to IDC stating:

> "We have been approached by Africa Resource Limited (ARL) who is willing to settle the outstanding balance on our behalf.
> We have agreed with them that they can settle the outstanding amount and IDC will release all security held by them to ARL"

[15] Notwithstanding payment of the full amount owed by Salister to the IDC. IDC would not release the securities held by it.

[16] On 23 June 2010 IDC advised Africa Resources of the reasons for not releasing the securities and the retention of the amount of R5 757 364.56. The letter stated:

> "Our client is reluctant to relinquish its rights to the securities it holds in respect of the indebtedness of Salister Diesel in favour of ARL. It is also on the same grounds that the IDC will not allocate the payment towards settlement of Salister Diesel's account but will deposit same in an interest bearing account pending resolution of this dispute"

[17] On the 15th of February 2011, Salister was placed in final winding up by this court. The liquidators argue that the payment of the funds to the IDC constituted a load to Salister. African Resources contends that the funds paid to IDC constituted an offer in order to take over the securities and when IDC refused to apply the funds paid to the IDC loan the money stands to be repaid to African Resources Ltd.

[18] The question that rises is whether Africa Resources made a loan to Salister or whether it concluded a settlement agreement with the IDC and the IDC was in breach of that agreement.

[19] Georgiades AJ in the court *a quo* found that the payment of the funds to IDC could never constitute a loan to Salister as it was never appropriated to the loan account. He held that when IDC refused to appropriate the monies to the loan, Africa Resources became entitled to repayment of the funds as the loan was never discharged.

[20] African Resources argued before us that when it paid the amount of R5 757 364.56 directly to the IDC and made this payment

in accordance with the second option, the clear agreement was that if the required sum was paid to IDC, the IDC would release the securities. It argued further that when the IDC did not accept payment of money as payment of the indebtedness of Salister it did not accept it as a loan made to Salister.

[21] In my view the letter of the 9 April 2010 that IDC wrote to Africa Resources is dispositive of the appeal. The IDC provided two options for the settlement of the indebtedness. The one option involved the sale and purchase agreement between Salister and Africa Resources and confirmation that security should be released to Africa Resources.

[22] The second option, chosen by Africa Resources entailed providing a loan to Salister to settle the IDC in full and take over securities from Salister once this have been released by the IDC. Clearly, the second option does not provide for a settlement agreement between Africa Resources and the IDC, it expressly states that the approval of IDC would not be required for Africa Resources to make a loan to Salister. In terms of the second option, Africa Resources made a loan to Salister and did not contract with the IDC.

[23] In my view, Salister has a legal right to be in possession of the money as it was lent to it and paid on its behalf to the IDC. Salister would have had a quasi-vindicatory claim to the monies if Africa Resources had paid directly into its account and thereafter Salister paying the money over to IDC, it should follow that Salister would still have the same quasi-vindicatory claim where the monies were paid for and on its behalf to the IDC.

[24] I would have upheld the appeal with costs.

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K MATOJANE
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION

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