

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG NORTH, PRETORIA DIVISION

10/8/2012

Case No: 14192/10

In the matter between:

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED: ✓
DATE: 10/8/12
SIGNATURE: [Signature]

BLUE CELL (PTY) LTD (IN LIQUIDATION)

Applicant

And

BLUE FINANCIAL SERVICES (PTY) LTD

First Respondent

BLUE EMPLOYEE BENEFITS (PTY) LTD

Second Respondent

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

1. The two respondents in the principal application apply for leave to appeal against the judgment and order granted against them on the 18<sup>th</sup> April 2012.
2. The applicant was liquidated by this court at the instance of the two respondents. Subsequently, the applicant's liquidators, acting in its name approached the court for an account of profits made by the respondents as a result of the unlawful appropriation of the applicant's business both pre and

post liquidation. During these proceedings it became common cause that the applicant's liquidation had been brought about, if not solely then to a decisive extent, by the presentation under oath of a factual situation that was incorrect. It furthermore became common cause that the respondents had, prior to applicant's liquidation, diverted a large portion of income that should have accrued to the now insolvent company.

3. In the light of these common cause facts the respondents' counsel conceded during the hearing of the principal application, in the presence of their representatives and of their attorney, that the applicant's liquidators were entitled to an account and payment of the sum due, which constituted the income the applicant should have received prior to liquidation.
4. Respondents expressly conceded that they were in the light of the fact that income had been unlawfully diverted into their pockets, not entitled to set off any moneys they might have advanced on loan account to the applicant against income that was only established to have existed after liquidation and accrued to the insolvent company only after the sum total thereof had been determined by an order of court.
5. The notice of appeal now suggests that the court erred by failing to allow set – off to be applied in respect of several items included as part of the loan account. Not only does this argument fly in the face of the admission made during the hearing of the principal application, but it also misconstrues the nature of set-off, which cannot occur in insolvency after the loan account has been submitted as a concurrent claim, against an asset – the claim for pre-liquidation profits - the existence of which was only established after a final

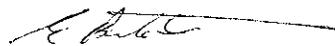
order of liquidation was granted, as a result of the liquidator's administration of the estate.

6. The respondents were fully aware of this problem when the principal application was argued and disavowed any reliance upon set-off under oath.
7. Regarding the post-liquidation profits, against the granting of which the respondents also seek leave to appeal, the then provisional liquidator entered into the agreement with the respondents to continue the applicant's business on the basis that the liquidation had been brought about in a lawful and regular fashion.
8. Once this was proven to be incorrect and it was established that the liquidation order was obtained by stealth and deceit, no enforceable agreement redounding to the respondents' benefit could be entered into with the perpetrators of the deceit.
9. The provisional liquidator was in any event not authorised to enter into that agreement and if he was, he would have been obliged and entitled to cancel the same and claim any profits earned from the conduct of the business for the liquidated company once he became aware of the true state of affairs.
10. The respondents' submission that another court could award the post-liquidation profits to them has no prospect of success.
11. Regarding the order for interest, against which the respondents wish to appeal, it is clear that the liquidated company is entitled to be placed into the position it would have been had the deceit not occurred. It would have earned interest on any profit – or would have been able to do so.
12. As far as the punitive costs order sought to be appealed against is concerned, there was ample evidence that the court was inveigled into granting a

liquidation order by a skewed – if not designedly false – presentation of the facts. Once this deceit was uncovered, the court was entitled – in the exercise of its judicial discretion - to grant a special costs order, not only to mark its disapproval of the respondents' conduct, but also to ensure that the liquidated company was not saddled with the additional burden of any attorney and client costs in its quest to right a palpable wrong perpetrated upon it.

13. There is therefore no reasonable prospect that another court will come to a different conclusion than this court. The application for leave to appeal is dismissed with costs, including the costs of two counsel. Applicant sought a punitive costs order, but there is no suggestion that the exercise of the fundamental right to seek leave to appeal was tainted by any impropriety. This request is therefore refused.

Dated at Pretoria on this 10<sup>th</sup> day of August 2012



E BERELSMANN

Judge of the High Court.

Case no: 14192/10

Date of the hearing : 24 July 2012

Judgment delivered on : 10 August 2012

Counsel for the Applicant : Adv L J Van Tonder  
Adv J G Smit

Instructed by : Martini Patlansky Attorneys, Johannesburg

Counsel for the Respondent : Adv P Ellis SC  
Adv M P Van der Merwe

Instructed by : Van der Merwe du Toit Inc, Pretoria