Editorial note: Certain information has been redacted from this judgment in compliance with the law.

REPUBLIC OF SOUTH AFRICA

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

CASE NO: 048817/2022

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

..... **...14/12/2023...**
SIGNATURE **DATE**

In the matter between:

UNIFIED PATROLL LIMITED (IN LIQUIDATION) **Applicant**

(A company incorporated in the United Kingdom
With a company registration number: 09692858)

and

PATIENCE MWAKURUDZA **Respondent**

(Foreign passport number: […] and
[…])

JUDGMENT

MANOIM J:

[1] This is an application for the provisional sequestration of the respondent. The applicant Unified Payroll Limited is a company based in the United Kingdom ("UK") but now in liquidation. The application is brought on the authority of the joint liquidators of the company. Although they are based in the UK, they have authorised Mr Leonard Katz, an attorney practising with the firm ENSafrica, to bring this application on their behalf.

[2] The respondent is a Zimbabwean citizen, but she is resident in South Africa and has assets here, hence the reason this court has jurisdiction. She was employed by a company registered in South Africa known as Applemed SA, the latter being a company related to the applicant.

[3] Central to this case are the actions of a London based Zimbabwean businessman Zwelithini Ncube. Ncube and the respondent were in a romantic relationship when the events relevant to this application occurred. This personal information is relevant to both the cases of the applicant and the respondent. The applicant's case in a nutshell is that Ncube used the respondent to conceal the flow of monies he unlawfully misappropriated from UPL to evade creditors of UPL. His relationship with the respondent enabled him to do so without the need for any paper trail beyond the payments and withdrawals.

[4] The respondent however claims she became the innocent scape goat of Ncube's fraudulent design and because of their relationship she was taken advantage of and asked no questions. The respondent does not contest that Ncube misappropriated moneys from UPL, but she does contest that she was a partner in that fraudulent enterprise and hence the application for sequestration is unfounded.

The applicant's business in the United Kingdom

[5] UPL was registered in the United Kingdom in 2015. Ncube was its founder, sole director, and sole shareholder until its liquidation. Its business was that of an employment agency. It would employ people and in turn supply them to employment agencies who in turn would supply them to employers. The primary employers were National Healthcare Service Trusts ("NHS Trusts"), and the employees were mostly health care workers. This had implications for the flow of money because the flow of money was not a direct one between the de facto employer and employee but instead was routed via intermediaries and this is where Ncube took advantage of the situation to line his own pockets.

[6] Prior to 2017 there was a loophole in tax collection. If the employee elected to be paid to a personal service company ("PSC") the umbrella company in this case, UPL was not required to deduct PAYE and insurance ("NICS"); the exception to this being VAT, which they to deduct. These payments were the responsibly of the PSC to pay the UK tax authority, Her (now His) Majesty's Revenue and Customs ("HMRC").

[7] In 2017 the UK tightened its tax laws to combat tax avoidance by employee making use of PSC's. This affected the obligations of umbrella companies such as UPL. UPL received the employee's gross remuneration from the employer, typically an NHS Trust. UPL was obliged in terms of the new tax legislation to deduct PAYE and NICS from an employee's remittance, before paying the balance over to the employee. UPL was then responsible for paying the deducted PAYE and NICS to the HMRC. But UPL did not always do so. It retained monies it received on behalf of the employees, and which did not belong to it, but which were owed to the HMRC.

[8] As part of the new reforms the UK tax authority began to audit firms who served as intermediaries like UPL. The applicant explains that:

> *"In order to conceal that UPL had not made the tax deductions, Ncube and the respondent manufactured false pay slips which reflected that the worker was on the PAYE scheme whereas in fact the worker had contracted through a PSC and was on the Ltd Co. scheme. The false pay slips reflected that PAYE and NICs had been deducted which was a misrepresentation of the true position*."

[9] But UPS' fraud went further. As the applicant explains:

> *"In addition to the PAYE/NICs fraud, UPL also committed VAT fraud. As a business making onward taxable supplies for the purposes of VAT, UPL charged VAT for the supplies of staff made to its customers. UPL failed, however, to declare and properly*

account for the VAT received from its customers. UPL's records confirm that VAT was charged but not accounted for to HMRC."

[10] In order to ensure compliance with the new tax regime the NHS introduced audits of umbrella companies. The audits were carried out quarterly. The auditors would monitor a sample of pay slips to check if the PAYE and NIC deductions had been made and paid out in the correct amounts to HMRC. I do not have the detail of how this was discovered but eventually Ncube's fraud was uncovered. This is not in dispute.

[11] As part of the fraudulent scheme and the link with the respondent, are two intermediary companies known as Applemed UK and Applemed SA. The payment trail of the funds flowed from UPL to Applemed UK then Applemed SA, and then from the latter, into the accounts of the respondent, hence these proceedings.

[12] According to the liquidators in their application to the UK courts Ncube is liable for just over £40 million pounds in respect of NIC/PAYE and £17 million in respect of VAT and thus a total of over £58 million pounds.

[13] What then followed were a series of court orders against Ncube and his entities. In October 2021, HMRC obtained an order from a UK court to provisionally liquidate UPL. In November 2021 UPL's liquidators obtained a worldwide freezing order against Ncube. The liquidators also instituted a personal claim against Ncube, and persons related to him. Then matters came closer to this

jurisdiction. In December 2021 UPL's liquidators obtained an order from a Western Cape High court recognising their appointment in South Africa and authorising a section 417 enquiry into UPL's affairs.

[14] A year later in October 2022, the liquidators of UPL concluded a settlement with Ncube. Ncube agreed to provide the liquidators with information as to how they could realise his assets for the benefit of UPL's creditors. Part of his 'coming clean' involved explaining how Applemed UK had been used by him to channel funds that were due to UPL. The liquidators claim that most of the monies emanating from UPL that were paid to the respondent had been channelled via Applemed UK.

[15] The respondent testified during the section 417 enquiry. The applicant seeks to rely on aspects of this testimony to support the relief it seeks.

The respondent's link to the UPL funds

[16] It is common cause that the liquidators cannot trace any payment made directly from UPL to the respondent. However, the liquidators rely on payments made by Ncube and Applemed UK, which they submit must have emanated from the funds misappropriated from UPL. The respondent does not deny receipt of these payments, but she places in issue that she was aware that they emanated from the tainted funds. The problem for her in this matter is that Ncube in his own capacity and in that as the controller of Applemed UK has admitted that these

funds were monies which should have been paid to UP and to which UPL was entitled,

[17] The liquidators have followed the trail from UPL via the intermediaries to the respondent's bank account with FNB. These payments total an amount of R34 705 935.40. The liquidators trace some of the monies as follows:

a. approximately R20.7 million paid by Applemed UK;

b. approximately R10.3 million paid by Ncube;

c. approximately R1.7 million paid toy Applemed SA.

[18] The respondent admits the receipt of these monies from the source. However, her argument is that there is no nexus between these payments to her and the fraudulent scheme perpetuated by Ncube. The applicant contends that whilst the respondent may not have been familiar with all the details of the scheme there is sufficient evidence to suggest that she knew that UPL was the source of this money and secondly given the size of these amounts that she must have known that the money was not from revenue generated legitimately by UPL. This is the essence of the present case. Was the respondent simply an innocent payee caught up in Ncube's machinations or was she a conscious, as the liquidators would have it, co-conspirator with Ncube, who now that they have fallen out personally and professionally, attempts to extricate herself from culpability.

[19] One of the issues in contention is the respondent's level of responsibility in Applemed SA. It is common cause that she was employed by it. The applicant alleges that the respondent was the head of UPL's compliance and customer service divisions which were run through Applemed SA. The respondent admits she was the manager of compliance but says this function was a 'back-office' function limited to checking candidates ID documents and their right to work in the UK. She distinguishes this function from so-called 'front-office' functions which she says were the sole responsibility of Ncube. One of the payments made to the respondent was amount of R 5million which she says was paid to her as part of a settlement package.

[20] When she was pressed during the section 417 enquiry as to how she had achieved such a favourable package of R 5 million rand, a package that exceeded two years of turnover for Applemed SA (R 1,5 million in 2019 and 2,9 million in 2020 according to the financials) she stated that Applemed SA was just a shell company or a back office. Whatever income was earned she said came from UPL and she was contracted to UPL. She conceded that Applemed SA on its own did not have money.

Approach to the law

[21] It is common cause that this is an application for provisional sequestration and therefore the approach in *Kalil v Decotex* applies. This approach was succinctly summarised in *Payslip Investment Holdings CC v Y2K Tec Ltd* 2001 (4) SA 781 (C) by Brand J.

> *"Guidelines as to how factual disputes should be approached in an application such as the present were laid down by the Appellate Division in Kalil v Decotex (Pty) Ltd and Another* 1988 (1) SA 943 (A)*. According to these guidelines a distinction is to be drawn between disputes regarding the respondent's liability to the applicant and other disputes. Regarding the latter, the test is whether the balance of probabilities favours the applicant's version on the papers. If so, a provisional order will usually be granted. If not, the application will either be refused or the dispute referred for the hearing of oral evidence, depending on, inter alia, the strength of the respondent's case and the prospects of viva voce evidence tipping the scales in favour of the applicant. With reference to disputes regarding the respondent's indebtedness, the test is whether it appeared on the papers that the applicant's claim is disputed by respondent on reasonable and bona fide grounds. In this event it is not sufficient that the applicant has made out a case on the probabilities. The stated exception regarding disputes about an applicant's claim thus cuts across the approach to factual disputes in general".*

[22] The first issue to consider is the legal basis for the applicant's claim. It is based on delictual, not contractual, liability. This is the essence of the answer to the respondent's argument that there needed to be a cession of action from Applemed SA or Ncube to the applicant for it to have locus standi. Once it has

established that its case is based on aquilian liability, the applicant alleges that the respondent is a joint wrongdoer along with Ncube. Hence based on the *condictio furtiva* there does not need to be contractual privity between the parties.

[23] That being said, the next issue is whether the claim based on the *condictio* can be established – has the respondent disputed this claim based on reasonable and bona fide grounds.

[24] The applicant seeks to refute this. Here the applicant relies on two sources. The respondent's answers to certain questions posed to her during the 417 enquiry and an email she authored written to colleagues at UPL. I consider these next.

[25] The respondent has offered several explanations for why she was paid the money. The first was that some of this money was part of a resignation package she received. But this money was paid to her by Applemed SA not Applemed UK or UPL. Yet her testimony in the section 417 hearing was that UPL was responsible for payment of Applemed SA's expenses.

> *"[UPL] was responsible for Applemed South Africa of* (sic) *taking care of any expenses or salaries of Applemed South Africa. So, I think my package would be coming from UPL where I was contracted to."*

[26] Yet in her answering affidavit the respondent contradicts herself on this point.

> *"I did not know that the primary source of the income was from the Applicant as I never ran financial interest (sic) of Mr. Zweli Ncube. I*

did not play any pivotal role as I was never a director or shareholder of the applicant."

[27] And then later she states:

"I did not know that the money originated from the Applicant, and Mr Ncube never discussed with me how he made payments, I did not know that the funds were fraudulently obtained, and we were a legitimate company working on behalf of the Applicant dealing with candidate compliance and customer service. There is a justifiable basis for the receipt of the funds, the liquidators are desperately looking for the money and they have targeted me with no factual and legal basis to do so. There is no shred of evidence that I colluded with Mr. Ncube to defraud anybody, I was never and I am not joint wrong- doer."

[28] The respondent's difficulty is that she received payments which she was not adequately able to explain. For instance, she said a R 5 million payment constituted a settlement package due to her from Applemed SA. But as the applicant points out this was an extraordinary package for someone who earned a monthly salary of R60 000 per month at the time. The so-called settlement package would have represented a package completely disproportional to this salary. This fact was put to her in the section 417 enquiry but although given the opportunity she was unable to do so.

[29] She also contended that some of the remaining money represented loans made to her. But as with the resignation package, she has no documents to show that this was the case. Nor, if some of these amounts constituted loans, is there any evidence that she repaid them in whole or in part. Her explanation for this lacuna is that all agreements between her and Ncube were oral agreements.

[30] But most damning for the respondent is how she dealt with her knowledge of the fraudulent payslips. In the record is an email sent by the respondent to recipients who include Ncube, and others, seemingly internal staff at UPL. The email is dated 10 September 2018. On the face of it she is apologising for a problem with the processing of payments. But what is significant in the email is the following comment:

> *"Office 8 is a dummy office that Merit created for us to process mock payslips for audit purposes for TFS and Redspot Care Limited Company Umbrella Scheme."*

[31] Office 8 is a reference to an electronic accounting package. This extract shows that the respondent knew that the payslips were fraudulent and the reason for this.

[32] The respondent does not deny sending the email. Her explanation is that she was acting under instructions. But if the respondent was some junior player acting under orders this is not supported by the text of the same email, were she goes on to state:

> *"We are open to suggestions and any changes that can be made to improve the service and avoid further confusions. We have taken this as a learning curve for the future. I would also suggest that Zwe should explain this arrangement to everyone concerned and affected by this arrangement like Sandra Q."*

[33] The respondent has not been able to demonstrate that its indebtedness is disputed on bona fide and reasonable grounds. The respondent's difficulty is that she had to reconcile two contradictory versions. In order to minimise her involvement in Ncube's fraudulent design she had to profess to a limited involvement in back-office operations. But this is not borne out by the text of the email I quoted earlier. But the other difficulty was accounting for the R 5 million settlement she received? Why would she receive a payment of this size given her limited involvement and level of salary as reflected in her payslips. This must mean she had a greater involvement in the business if this was her entitlement. Then there is the absence of any documentation to explain the payments. Here her relationship with Ncube is used as the excuse. There was no need for any documentation given the personal relationship that then existed between them. But even if there was no formal documentation one would have expected at least a message that might accompany payments of this size. But there are none in the record. The relationship between them has the more likely explanation why Ncube could safely use her as a conduit for the funds which both knew were illicit. Hence no documentation and the arm's length payments.

[34] The other difficulty for the respondent is that she had to go on record during the 417 enquiry and could be cross examined. Her attempt to resurrect a version in the answering affidavit has further undermined her credibility. The version put up by the respondent is not bona fide or reasonable and stands to be rejected. The applicant has established a liquidated claim.

Dispositions in terms of section 8(c) of the Insolvency Act

[35] The applicant also relies on section 8(c) of the Act which states:

> *8. A debtor commits an act of insolvency-*
>
> *(a) ….;*
>
> *(b) ….;*
>
> *(c) if he makes or attempts to make any disposition of any of his property which has or would have the effect of prejudicing his creditors or of preferring one creditor above another;*

[36] The applicant alleges that the respondent has committed several acts of insolvency. The basis for this, is that during the period December 2017 and January 2022, the respondent made payments from her bank account that exceeded R 43 million. This emerged from an analysis the liquidators performed of drawings from her bank accounts during that period. The applicant alleges that these payments were made when her liability to UPL "*already existed and continued to increase*". In her answering affidavit the respondent does not dispute that the payments were made, or paid in this amount, but instead asserts that they were made before UPL was liquidated and that no creditors have laid a

claim against her. But the respondent does not deal with the nub of the allegation made against her, nor does she dispute the amounts.

[37] No explanation is proffered to explain the movement of such large sums into and from her account in this period. I conclude that these must have been dispositions made in contravention of 8(c) of the Insolvency Act.

Analysis of the legal requirements

[38] The applicant's claim is based in delict specifically, the *condictio furtiva*. The remedy is available to an owner (in this case the applicant) to recover money from the thief.[1] In this case the issue is what knowledge the respondent had of the fraudulent design. Certainly, the email suggests that she had knowledge that UPL was engaged in processing fraudulent payslips. In *Crots v Pretorius* the court explained the liability in the following way:

> *"The respondent will be liable if, on a balance of probabilities, he recognised the real possibility that Petrus did not have the right to deliver the cattle to him or that it was somebody else's cattle and he deliberately shut his eyes and entered into the transaction, thereby taking the risk of the consequences if the cattle were being stolen. Knowledge in the form of dolus eventualis is present if all the objective, factual circumstances justify the inference on a balance*

[1] First National Bank of Southern Africa v East Coast Design CC 2000 (4) SA 137 (D&CLD) at 144E- I,

of probabilities that the respondent actually and subjectively foresaw that someone else had title to the cattle."[2]

[39] In *Frankel Pollak v Stanton* the court whilst acknowledging that actual knowledge is required explained what suffices to constitute this:

"In all the examples I have given, where knowledge is essential, there is a common thread. What is required is actual knowledge. Where a person has a real suspicion and deliberately refrains from making inquiries to determine whether it is groundless, where he or she sees red (or perhaps amber) lights flashing but chooses to ignore them, it cannot be said that there is an absence of knowledge of what is suspected or warned against. In the absence of direct evidence, a court has to determine the existence of knowledge as an inference from the established facts and circumstances. If a person's professed ignorance is so unreasonable that it cannot be accepted that he or she laboured under it, evidence of the ignorance will not be believed in the absence of some acceptable explanation. But this amounts to a finding of actual, subjective knowledge made when a person wilfully precludes himself or herself from acquiring it.[3]

[40] The email shows a red light flashing for the respondent or at best for her an amber one. This was not satisfactorily explained at either the 417 enquiry or with

[2] 2010 (6) SA 512 (SCA) at 515 D-F.
[3] 2000 (1) SA 425 (W) at 438.

the further benefit of hindsight in the answering affidavit. The reason is quite simple; the respondent had full knowledge of what was going on and later received large payments into her account albeit via conduits. She was aware both of the fraudulent payslips and payments of large undocumented payments to her account. The link must have been obvious to a woman of business – the red lights must have flashed.

[41] I turn next to the question of whether the respondent's liabilities exceeded her assets. It is common cause that her assets are valued at R25 million. As noted earlier her liabilities exceed R 34, 7 million. In addition, she has admitted to outstanding debt in respect of a bond on her property although the extent is not disclosed. The respondent has not refuted these facts. There is also the matter of R 43 million that was disbursed over the period of time from her bank account which would constitute a self-standing ground of insolvency in terms of sections 8(c) read with section 9(b) of the Insolvency Act.

[42] The sequestration, the applicant argues, will be of advantage to creditors as she owns unencumbered properties of R 19 million whose proceeds could be distributed to creditors. Moreover, it is argued that an orderly disposition of these assets by a liquidator is more favourable to creditors than a series of auctions under the auspices of the sheriff. The other factor favouring sequestration and hence the engagement of liquidators is the realisation of the many transactions, which appear to be dispositions without value.

[43] Finally, the respondent has not alleged any special circumstances for why an order should not be granted.

Conclusion

[44] The applicant has established that it has a liquidated claim in terms of section 10(a) of the Act. For the purposes of section 10(b), the applicant has established both (i) that the respondent is insolvent and (ii) has committed an act of insolvency in terms of section 8(c). There is reason to believe that the sequestration will be to the advantage of the respondent's creditors in terms of section 10(c). Hence, a case has been made out for the respondent to be provisionally sequestrated.

ORDER:-

[45] In the result the following order is made:

1.The estate of the respondent is placed under provisional sequestration.

2. A rule nisi is issued calling upon the respondent and any interested parties to show cause, if any, to this Court on a date to be advised by the Registrar, to show cause why:

2.1. the respondent's estate should not be placed under final sequestration; and

2.2. the costs of this application should not be costs in the administration of the respondent's insolvent estate.

3. Directing that the order be served on:

3.1. The respondent at […] E[…] Estate, Eikenhof, Johannesburg, Gauteng (“the residential address”);

3.2. The South African Revenue Service, Johannesburg;

3.3. The employees of the respondent, if any, at the residential address; and

3.4. All registered trade unions representing the employees of the respondent, if any.

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N. MANOIM

JUDGE OF THE HIGH COURT

GAUTENG DIVISION

JOHNANNESBURG

Date of hearing: 16 October 2023

Date of Judgment: 14 December 2023

Appearances:

Counsel for the Plaintiff: G Woodlands SC

	K Reynolds
Instructed by.	Edward Nathan Sonnenbergs Inc
Counsel for the Defendant:	T Mukwani
Instructed by:	T. Mukwani Attorneys