REPORTABLE

IN THE KWAZULU-NATAL HIGH COURT, DURBAN
REPUBLIC OF SOUTH AFRICA

CASE NO. 1757/2009
CASE NO. 801/2009

In the matter between:

MARCO ACCOLLA PLAINTIFF

and

P K PILLAY
T/a NEWLANDS SPORTS BAR LIQUOR STORE DEFENDANT

JUDGMENT Delivered on 12 November 2009

SWAIN J

[1] The plaintiff seeks provisional sentence against the defendant in two consolidated actions for payment of the amounts of R900,000.00 (being the total amount claimed in respect of three cash cheques, each in an amount of R300,000.00 in Case No. 801/2009) and R300,000.00 (being the amount claimed in respect of one cash cheque, in the amount of R300,000.00 in Case No. 1757/2009).

[2] The actions were consolidated as they all have the same underlying causa, namely they were all issued by the defendant in respect of the purchase price of a business known as Groove Nightclub, sold by Club 11 on Point cc t/a Groove Nightclub to the defendant.

[3] It is common cause that the terms and conditions of the sale are contained in two documents, namely:

[3.1] An Agreement of Sale signed by the parties on 30 June 2008, in which the seller is described as Club 11 on Point cc t/a Groove Nightclub, the purchaser is the defendant and the purchase price is the sum of R900,000.00. One Klinton Pillay is also a party to the agreement as surety for the defendant.

[3.2] A document headed "Consent to Judgment" also signed on 30 June 2009, in which the defendant is described as the "1st Defendant" and the said Klinton Pillay is described as the "2nd Defendant". The plaintiff is described as the "1st Plaintiff" and one Rosanna Noella Narandas is described as the "2nd Plaintiff". Narandas, together with the plaintiff, are the sole members of the close corporation, Club 11 on Point cc t/a Groove Nightclub, the seller in the Agreement of Sale. In the Consent to Judgment the defendant and the said Klinton Pillay consent to judgment in the sum of R3,100.000.00.

[4] The Agreement of Sale provides that the purchaser (the defendant) will make payment of the purchase price of R900,000.00 by furnishing the seller (Club 11 on Point cc t/a Groove Nightclub) with three cash post-dated cheques dated 01 March 2009, 01 April 2009 and 01 May 2009. The cheques were to be delivered to the seller, on or before the date of signature of the agreement.

[5] The "Consent to Judgment" records that the "1st and 2nd Defendants are unable to forthwith pay the above amount and costs to the Plaintiffs and the Plaintiffs agree to grant an extension of time to the 1st and 2nd Defendants to effect such payment, 'subject to certain terms and conditions'." The conditions are that the 1st and 2nd defendants shall pay the claim "amount" for which it is liable by way of:

[5.1] An initial payment of R1M on or before the 01 July 2008 and

[5.2] Further and subsequent payments of R300,000.00 each payable by way of seven post-dated cash cheques dated for 01 August 2008, 01 September 2008, 01 October 2008, 01 November 2008, 01 December 2008, 01 January 2008 *(sic)* and 01 February 2008 *(sic).*

[6] It is common cause that the defendant paid the close corporation the deposit of R1M and gave the plaintiff ten cash cheques in the amount of R300,000.00 each.

[7] The cash cheques for 01 August 2008, 01 September 2008 and 01 October 2008 were honoured on presentation. The defendant however countermanded payment in respect of the cheques dated 01 November 2008, 01 December 2008, 01 January 2009 and 01 February 2009, in respect of which the plaintiff seeks provisional sentence. The defendant alleges it was entitled to do so because of certain material facts which were not disclosed to the defendant before the sale. The defendant alleges that had he been aware of these facts, he would not have bought the nightclub. In addition, the defendant alleges that the plaintiff and the said Narandas, failed to provide him with a copy of what he referred to as a "second agreement" which it transpires was the document referred to as the "Consent to Judgment".

[8] It is however not necessary to consider these defences at this stage because Mr. Finnigan, who appeared for the defendant, confirmed that the only defence raised by the defendant in opposition to the claim for provisional sentence was the following:

[8.1] It is common cause that it was initially agreed that the purchase price of R4M would be paid by means of a deposit of R1M, and the balance in monthly instalments of R300,000.00. The defendant would furnish a Consent to Judgment as security for payment of the balance.

[8.2] The defendant alleges that the purpose of splitting the purchase price between the Agreement of Sale and the Consent to Judgment, in the respective amounts of R900,000.00 and

R3,100,000.00 was to save the seller of the business Capital Gains Tax.

[8.3] The defendant alleges that the Agreement of Sale was accordingly illegal as it was prohibited by statute. The purpose of both parties in contracting in the way they did, and reflecting the sale price as an amount of only R900,000.00 in the Sale Agreement, was to deceive the Receiver of Revenue into levying a lesser amount in respect of Capital Gains Tax on the sale, than would be the case if the Receiver was aware that the true sale price was R4M.

[8.4] It is alleged that the plaintiff, who sues as the bearer and legal holder of the cheques in question signed the Sale Agreement on behalf of the plaintiff, was party to the illegality and as result is not entitled to enforce payment of the cheques.

[9] The plaintiff denies that this was the case, saying the following:

"…..it is clear that the defendant understands that it is was *(sic)* the intention of the parties at all material times that the two agreements, namely the Sale Agreement and Consent to Judgment – were, and are, to be read together.

I deny that there was any intention, as the defendant appears to imply, to evade payment of tax and I respectfully submit that this is a matter between the close corporation and the South African Revenue Services."

[10] No alternative explanation is however advanced by the plaintiff, or his attorney, as to why the Sale Agreement was structured in such an unusual manner.

[11] It is trite that the defendant must furnish such evidence as would satisfy the Court that the probability of success in the principal case is against the plaintiff

Sonfred (Pty) Ltd. v Papert
1962 (2) SA 140 (W) at 143 H

[12] The defendant bears the burden of proof in the principal case of establishing that the Sale Agreement was structured in the manner it was, with the object of deceiving the Receiver of Revenue, in the manner alleged. This burden has to be discharged by the defendant, satisfying this Court on a preponderance of probability, that it is unlikely the plaintiff will succeed in the principal case

Syfrets Mortgage Nominees Ltd.
v
Cape St. Francis Hotels (Pty) Ltd
1991 (3) SA 276 (SE) at 286 D - E

[13] Considering the most unusual matter in which the sale was structured and the direct allegation by the defendant, that it was

done so in order to save the seller the payment of Capital Gains Tax, an explanation by the plaintiff, or his attorney, was required. It is trite that silence may amount to a damaging admission, when it suggests that a party was unable to explain suspicious circumstances

Zeffert et al – The South African Law of Evidence pg 437

If an innocent explanation could be advanced by the plaintiff for the most unusual and suspicious manner in which the sale was structured, I would not have expected the plaintiff to content himself with a bare denial of the allegation, as well as the averment "that this is a matter between the close corporation and the South African Revenue Services".

[14] I agree that this is a matter which concerns the South African Revenue Services, which will find expression in due course in the order I intend making. It is however a matter which also concerns this Court, which will find expression in a similar manner.

[15] I am satisfied that the defendant has established on a preponderance of probability that it will succeed in discharging the onus of proving in the principal case, that the sale agreement was structured in the manner it was, with the object of deceiving the Receiver of Revenue into levying Capital Gains Tax on a sale price of R900,000.00, when the true sale price was R4M.

[16] What has now to be decided is whether this conclusion renders the contract of sale illegal and unenforceable, with the consequence that a party to the contract cannot claim specific performance or payment, in terms of the contract.

Christie – The Law of Contract in South Africa
5th Edition, pg 391

[17] The legislative provisions which impose Capital Gains Tax are contained in the Eighth Schedule to the Income Tax Act No. 58 of 1962 (hereafter referred to as the Act) read with Section 26 A of the Act, which applies the general provisions of the Act to the Eighth Schedule.

[18] Section 104 of the Act, which applies to Capital Gains Tax, provides *inter alia* as follows:

"Offences and penalties. – (1) Any person who with intent to evade or to assist any other person to evade assessment or taxation ……. …(c) prepares or maintains or authorizes the preparation or maintenance of any false books of account or other records or falsifies or authorizes the falsification of any books of account or other records, or (d) makes use of any fraud, art or contrivance whatsoever, or authorizes the use of any such fraud, art or contrivance, shall be guilty of an offence and liable on conviction to a fine or imprisonment for a period not exceeding five years."

[19] As stated by Solomon J A in the case of

Standard Bank v Estate van Rhyn

1925 AD 266 at 274

"……..The contention on behalf of the respondent is that when the Legislature penalises an act it impliedly prohibits it, and that the effect of the prohibition is to render the Act null and void, even if no declaration of nullity is attached to the law. That, as a general proposition, may be accepted, but it is not a hard and fast rule universally applicable. After all, what we have to get at is the intention of the Legislature, and, if we are satisfied in any case that the Legislature did not intend to render the Act invalid, we should not be justified in holding that it was. As *Voet* (1.3.16) puts it – "but that which is done contrary to law is not *ipso jure* null and void, where the law is content with a penalty laid down against those who contravene it." Then after giving some instances in illustration of this principle, he proceeds: "The reason of all this I take to be that in these and the like cases greater inconveniences and impropriety would result from the rescission of what was done, than would follow the act itself done contrary to the law."

[20] The approach to be adopted when dealing with a revenue statute, as in the present case, is outlined in the words of Innes C J in the case of

McLoughlin v Turner

1921 AD 537 at 544

"……..This is a revenue statute and it is a well recognised rule of construction that the mere imposition of a penalty for the purpose of protecting the revenue does not invalidate the relative transaction. Where the object of the Legislature in imposing the penalty is merely the protection of the revenue, the statute will not be construed as prohibiting the act in respect of which the penalty is imposed. But, of course, the Legislature may prohibit or invalidate the

transaction even where the sole object is to protect the revenue. And if that intention is clear effect must be given to it. But the literal meaning of the language used is not always decisive on the point."

[21] An important issue in this context is whether those objects are exclusively concerned with the protection of the revenue "but embraced the protection of the public also"

per Innes C J in McLoughlin's case *supra* at 544

[22] An important factor is whether one of the objects of the Act was to prevent "frauds upon the revenue"

van Wyk v Rottchers Saw Mills (Pty) Ltd.
1948 (1) SA 983 at 988

and

Brits v van Heerden
2001 (3) SA 257(C) at 272 C – E

[23] A reason for holding a prohibited act to be invalid is "that recognition of the Act by the Court will bring about, or give legal sanction to, the very situation which the Legislature wishes to prevent."

per Fagan J A in

Pottie v Kotze
1954 (3) SA 719 (A) at 726 H

and

Absa Insurance Brokers (Pty) Ltd v Lutting & Another
1997 (4) SA 229 (SCA) at 239 H

[24] Any cognizable impropriety, or inconvenience which may flow from a declaration of invalidity has to be considered

Potties case *supra* at 725 E

as well as whether such a declaration of invalidity would have "capricious effects the severity of which might be out of all proportion to that of the prescribed penalties, it would bring about inequitable results as between the parties concerned and it would upset transactions which ……. the Legislature could have had no reason to view with disfavour."

per Fagan J A in Potties case *supra* at 727 E – G

[25] A further consideration is whether:

"In short, the consequences of visiting invalidity upon non-compliance are not so uniformly and one sidedly harsh that the Legislature cannot be supposed to have intended invalidity to be the consequence."

per Marais J A in

Eastern Cape Provincial Government

v

ContractProps 25 (Pty) Ltd.

2001 (4) SA 142 at 148 B – C

[26] The object of Section 104 (d) of the Act is to render the use of any fraud, with the intent to evade taxation, a criminal offence. The object of this section, or the mischief it was aimed at, was clearly to prevent frauds upon the revenue. The object however was not solely the protection of the revenue, but also the protection of the public, who have a legitimate interest in the fair and equitable assessment and levying of taxation.

[27] The Legislature clearly wished to prevent fraud being perpetrated upon the revenue, by creating the offence. Recognition of the validity of a contract, which has as one of its objectives, the perpetration of a fraud upon the revenue, would give legal sanction to that which the Legislature wished to prevent.

[28] As to the consequences of visiting invalidity upon the transaction, what has to be borne in mind is that the parties to the transaction have actively conspired to perpetrate a fraud upon the revenue. In this context I do not consider that a declaration of invalidity would bring about inequitable results as between the

parties concerned. The severity of a declaration of invalidity is not out of all proportion to that of the prescribed penalty, namely a sentence of a fine, or to imprisonment for a period not exceeding five years. Furthermore, it cannot be said that transactions will be upset, which the Legislature could have had no reason to view with disfavour, for the very object was to criminalise the perpetration of fraud upon the revenue.

[29] Declaring such a contract invalid is not uniformly and one-sidedly harsh, so that the Legislature cannot be supposed not to have intended invalidity to be the consequence. It must be emphasised that this is a contract where the parties have actively conspired, with one of the objectives of that contract being to perpetrate a fraud upon the revenue.

[30] In my view therefore, the intention of the Legislature in enacting Section 104 of the Act was to invalidate a transaction, one of the objectives of which was to perpetrate a fraud upon the revenue, in order to evade assessment or taxation.

[31] Accordingly, I am satisfied that the defendant has established on a preponderance of probability, that it will succeed in discharging the onus of proving in the principal case, that the Sale Agreement is illegal and unenforceable and that the plaintiff, who was a party to the illegality, cannot claim payment in terms of the contract.

[32] The plaintiff's claim for provisional sentence in terms of the cheques sued upon, therefore falls to be dismissed. In terms of Rule 8 (8) I have a discretion to order the defendant to file a plea . In the light of the findings I have made as to the object of the parties in concluding the Sale Agreement, in the manner that they did, based as such conclusion is upon the absence of any explanation by the Plaintiff to refute this conclusion, it may be concluded that it is grossly improbable that the plaintiff will be able to advance any innocent explanation in the principal case. If this is so, then it may be inappropriate for me to order the defendant to file a plea. Where provisional sentence is refused, and no order is made in terms of which the defendant is permitted to file a plea, the provisional sentence is dismissed and the proceedings are at an end.

Barclays National Bank Ltd. v Wollach
1986 (1) SA 355 (C) at 358 H – I

[33] Counsel however did not address me on this issue. It may be unfair to deny the plaintiff a further opportunity to offer an explanation in support of his denial, that the object was to reduce the sellers' liability for Capital Gains Tax. I am satisfied however that the plaintiff should be ordered to pay the defendant's costs (including the costs of the two adjourned hearings which costs were reserved) at this stage and that the costs should not be reserved for decision by the trial Court.

[34] The order I make is as follows:

1. Provisional sentence in Case No. 801/2009 and Case No. 1757/2009 is dismissed.

2. The defendant is ordered to file a plea within twenty days of the date of this order.

3. The plaintiff is ordered to pay the defendant's costs in respect of Case No. 801/2009 and Case No.1757/2009, including the costs of the adjourned hearings on 23 March 2009 and 12 June 2009.

4. The papers in this matter and this Judgment are referred to the Commissioner for the South African Revenue Service, for his consideration and any further action he may deem appropriate.

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SWAIN J

Appearances: /

Appearances:

For the Plaintiff	:	Mr. D.G. Tobias
Instructed by	:	Savera Maharaj & Dunn Durban
For the Defendant	:	Mr. D. W. Finnigan
Instructed by	:	Van Onselen Holing & Dlamini Umhlanga Rocks, Durban
Date of Hearing	:	03 November 2009
Date of Filing of Judgment	:	12 November 2009