IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN.

Case No: 4581/2021

In the matter between:

Sydwell Trading CC	First Plaintiff
Coalition Trading 1341 CC	Second Plaintiff
Mafika and Sons Trading (Pty) Ltd	Third Plaintiff
Khovish De Brand Marketing	Fourth Plaintiff
ELD Promotions (Pty) Ltd	Fifth Plaintiff
Makhosi Marketing (Pty) Ltd	Sixth Plaintiff
Platform Com (Pty) Ltd	Seventh Plaintiff
Wiseman Marketing (Pty) Ltd	Eighth Plaintiff
Blue Skull Promotions (Pty) Ltd	Ninth Plaintiff
and	
Sean Pillay and Company (Pty) Ltd	First Defendant
Pravashnie Pillay NO	Second Defendant

Judgment

Lopes J

[1] The plaintiffs in this action are all franchisees of The Unlimited Group (Pty) Ltd (‘TUG’). The first defendant is a company providing financial and taxation services and advice (‘the company’). At all material times, the sole shareholder and director of the company was the late Sean Pillay (‘the deceased’). I shall refer to the company and the deceased as ‘the company’ unless the context requires clarification. The second defendant is the deceased’s

widow, who is cited in her capacity as the executrix of the estate of the deceased.

[2] TUG concluded franchise agreements with the plaintiffs, who sold the short-term insurance products of TUG, including funeral, ‘scratch and dent’ and ‘accident cash’ policies. The plaintiffs invoiced TUG on a monthly basis, for the products sold, including value added tax (‘VAT’). TUG would then pay over to the plaintiffs the commission due to them, and the VAT portion was to have been sent to the Receiver of Revenue (‘SARS’).

[3] In order to assist the plaintiffs, and ensure that their tax liabilities were always complied with, TUG hired the services of the company, who was supposed to provide financial and taxation services to the plaintiffs. These functions included the calculation of VAT payable by each plaintiff on their due date, and to pay over the VAT payable to SARS, which the company would receive directly from TUG.

[4] That is the background to this action. The plaintiffs allege in their pleadings that VAT amounts were paid over to the company and/or the deceased, which were not, in turn, paid over to SARS. In addition, the company failed to render the VAT returns, properly, or at all. Those returns which were rendered by the company/the deceased were nil returns, in circumstances where the plaintiffs were actively trading, and owed VAT to SARS.

[5] The evidence of Mrs Louise Tracy McTavish, for the plaintiffs, may be summarised as follows:

(a) she is a Financial Business Partner at TUG;

(b) she holds an Honours Degree in Accounting, and is a qualified Cost and Management Accountant;

(c) prior to January 2019, and acting on behalf of TUG, she had been negotiating with the deceased to conclude a service contract. Initially TUG wished to have the plaintiffs pay their VAT directly over to the company, but by the 31st January 2019, TUG and the company agreed that TUG would withhold the VAT due to SARS by the plaintiffs, and pay it over to the company, who, acting for each plaintiff as its registered tax practitioner, would in turn pay it to SARS. This amendment to the system was because TUG feared that franchisees who came under financial pressure may be tempted to use their VAT collections as bridging finance, and not pay it over to the company;

(d) TUG viewed its responsibility to its franchisees to ensure that they were up-to-date with their taxes, in all respects. To this end, and as admitted in the defendants' plea, the company undertook for each plaintiff to draft annual financial statements, IRP5 reconciliations, PAYE returns and payments, VAT and the calculation of provisional taxes as required, including the submission of tax and VAT returns to SARS;

(e) the court bundles (A to E) as referred to in her evidence contained, for each plaintiff:

(i) the invoices rendered by them to TUG;

(ii) the internal electronic funds transfer documents ('EFT') compiled by her, showing the VAT payable by each plaintiff;

(iii) the EFT document would, in each case, trigger the payment to the account of the company, or the deceased. Two bank accounts were used – the deceased's private bank account (as per his initial

written instruction to TUG), and the company's bank account, as reflected on invoices sent to TUG; and

(f) the company would instruct TUG every two months (or whatever VAT period was applicable) of the amounts to be paid by the plaintiffs to SARS.

[6] The contents of the bundles meticulously laid-out the path of the monies paid over to the company, and Mrs McTavish was taken through the documents for the first two plaintiffs. She confirmed that the same process was followed for all the plaintiffs, and that the bundles confirmed the processes and payments for the plaintiffs. In addition, Exhibit 'A' was adduced in her evidence, containing a summary of the amounts due to each plaintiff, with the pages in the bundle cross-referenced. This enabled a ready and easy comparison of the relevant documents.

[7] Mrs McTavish also testified to the fact that the company charged each plaintiff R1 000 per month for the services which it rendered. Those amounts were claimed back by each of the plaintiffs on the basis that the company had not performed its obligations in terms of the agreement, because it and/or the deceased had not rendered VAT returns timeously, or at all, had rendered inappropriate nil returns, and had not paid over the VAT amounts to SARS. Instead, the monies had been stolen/appropriated by the company and/or the deceased.

[8] In cross-examination, Mr *Naidu*, for the defendants, went through numerous of the documents, pointing out that many of the invoices, bank statements, and some of the EFT requisitions did not reflect that the payments made were for VAT. Most of these references were to bank statements of one

kind or another, and the references, in the main, were that payments were made by TUG. Ten EFT documents were criticised by Mr *Naidu* as not reflecting that they were for VAT. Mrs McTavish pointed out that in those cases (as in some of the bank references), the invoice numbers of the plaintiffs were reflected, and the paper-trail in the bundles showed how those payments were arrived at, and were, indeed, VAT obligations of the plaintiffs, which the company was bound to pay over to SARS.

[9] The second witness for the plaintiffs was Mervyn Gregory Gavin, a financial manager at Burns Acutt, specialists in finance, taxation, and accounting. He holds a B Comm Degree (UNISA), completed his auditing articles, and has been employed in financial services for 21 years. He manages 150-170 accounts monthly, dealing with clients' payrolls, VAT calculations, and financial statements.

[10] Mr Gavin testified that he had been requested by Mrs McTavish to quote on the functions previously performed by the company. This was after the deceased had died. He stated that:

(a) he examined the tax profiles of all the plaintiffs, and discovered that, for the most part, no tax returns had been made by the company for the periods during 2018-2019, and nil returns had in a few cases been submitted by the company, in circumstances where it was clearly inappropriate for it to have done so;

(b) as part of his take-over, he went to the offices of the company. There he met the new owners, who gave him a flash-disc with very little useful information on it to assist him. He was then obliged to obtain the necessary information for him to be able to service the plaintiffs, from

TUG or the plaintiffs. Each of the plaintiffs had incurred penalties and interest charges from SARS because no returns had been filed and no VAT payments had been made – this stretched back from August 2018 until his take-over in November 2020; and

(c) Mr Gavin went through the bundles, identifying the documents he had prepared to demonstrate the position of each of the plaintiffs. As the eighth plaintiff was no longer a franchisee of TUG, he did not take-over that company as a client.

[11] That was the case for the plaintiffs, and the defendants closed their case without calling any witnesses, or adducing any documentation.

[12] Ms *Hennesey*, for the plaintiffs, submitted that the emails between the parties, the invoices, bank statements, internal EFT documents and summaries adduced in evidence by the plaintiffs amply proved the causes of action in the pleadings. *Inter alia*, the company and/or the deceased had admitted in correspondence that they received the funds sent to them for VAT, and failed to pay those monies over to SARS. In addition, the plaintiffs had established a complete and utter failure on the part of the company in fulfilling its contractual obligations. None of this was, in any effectual manner, rebutted by the defendants.

[13] With regard to costs, Ms *Hennesey* submitted that I should order that the defendants are liable for costs on a punitive scale. She conceded, correctly in my view, that it would have been difficult for the defendants' legal representatives fully to appreciate the facts until discovery was made, and

documents were delivered to them on the 24th February 2023. She submitted that thereafter, they should have attempted to settle the action to avoid the parties incurring the costs of trial. Ms *Hennesey* also conceded an error in the particulars of claim, in that the claim in favour of the fourth plaintiff in respect of fees, should only be in the sum of R17 000.

[14] Mr *Naidu*, submitted that where a court had to rely on the evidence of one party only, the evidence should be closely scrutinized. He referred to *Borcherds v Estate Naidoo* 1955 (3) SA 78 (A) at 79A, where Fagan JA stated:

> 'Here the one party to the alleged transaction of repayment is dead. The Court must therefore scrutinise with caution the evidence given by, and led on behalf of, the surviving party. This attitude had been adopted by the Courts in a number of cases in which a claim was preferred against a deceased estate, or a defence was set up to a claim by the estate.'

The learned judge of appeal then referred to various cases, in particular *Wood v Estate Thompson and Another* 1949 (1) SA 607 (D) at 614, where Selke J stated:

> 'I am not aware of any rule of our law or of any practice of our Courts which requires that, merely because a claim is one made against a deceased's estate, it must on that account be proved with a special degree of cogency, and I do not believe that any such rule exists. If it did, it would no doubt work for the protection of the estates of deceased persons against fraudulent claims, but, on the other hand, it might work considerable injustice on honest claimants against such estates. It seems to me that such a principle, if it existed, would obviously cut both ways, and, on the whole, I do not think the cases are really authority for more than the principle that the Court must examine with a very cautious eye uncorroborated evidence given in such cases, but I do not appreciate that the Court should do more in that respect than it is wont to do in all cases where interested evidence is given *ex parte* against someone who is not in a position to answer it.'

Fagan JA further recorded that he found no fault with the above statement except that he would prefer to omit the word ‘uncorroborated’, unless it meant ‘uncorroborated by evidence which is itself cogent enough to overcome the caution’.

[15] Mr *Naidu* also referred to *Cassel and Benedick NNO and Another v Rheeder and Cohen NNO and Another* 1991 (2) SA 846 (A), where the court approved of the statements in *Borcherds*, and recorded at page 851H that although ‘there is no rule requiring evidence against a deceased estate to be corroborated, corroboration may assist in satisfying the cautionary rule’.

[16] I have carefully considered the evidence of the plaintiffs’ witnesses. No suggestion was made that they were attempting to convey anything but the truth, and such vague criticisms of their evidence as were made, were unjustified. They both testified as representatives of the companies employing them, and they had no personal grudge against the company and/or the deceased, and no benefit to them was ever suggested. In this sense, this action is somewhat distinguishable from *Borcherds*. Nevertheless, I have no hesitation in accepting their evidence, corroborated as it was by the documentary evidence in both instances.

[17] In the plaintiffs’ particulars of claim, the allegation is made that the deceased (and, consequently, the company) traded recklessly in contravention of the provisions of s 218(2), read with s 77(3)*(b)* and s 22(1) of the Companies Act, 2008. Section 22(1) thereof provides:

> '**22. Reckless trading prohibited. –** (1) A company must not carry on its business recklessly, with gross negligence, with intent to defraud any person or for any fraudulent purpose.'

[18] There is no doubt whatsoever that, based upon the evidence of the plaintiff's witnesses and the documents adduced in evidence, that the company and the deceased did exactly what is prohibited in s 22(1).

[19] Mr *Naidu* referred to *Philotex (Pty) Ltd and others v Snyman and Others; Braitex (Pty) Ltd and Others v Snyman and Others* 1998 (2) SA 138 (SCA) and *Heneways Freight Services (Pty) Ltd v Grogor* 2007 (2) SA 561 (SCA), as 'pertinent and applicable judgments' demonstrating that there had been no evidence of reckless trading in this action. Those cases do not assist the defences of the company or the deceased in this action. The plaintiffs have clearly objectively demonstrated on a balance of probabilities that the deceased stole monies which he was obliged to pay over to SARS. His actions go beyond recklessness. This was not a case where the supine attitude of a director is to be analysed in order to determine recklessness. It relates to deliberate acts of theft and fraud.

[20] There was no dispute that the service fees charged by the company and paid to it, were R1 000 per month, for 17 months. There was also no suggestion that, if the evidence of the plaintiffs was accepted, that the plaintiffs were entitled to be reimbursed those monies, either on the basis that the work which the defendants were contractually obliged to render had not been performed, or as damages. With regard to costs, Mr *Naidu* submitted that the defendants' legal representative had to plead without full knowledge of the facts. These had only

become apparent after discovery, and the exchange of documents on the 24th February 2023. Thereafter, it took time for the documents (in excess of 450 pages) to be scrutinised and whatever checks could be made to be investigated and carried out.

[21] I understand, and accept the difficulties facing the defendants' legal representatives. The defendants' interests may, however, have been better served had the matter been settled before trial, as the result seemed inevitable. However, as Mr *Naidu* submitted, the impact of any decision would have consequences for the interests of the estate of the deceased, and the legal representatives had to ensure that any liabilities were properly established.

[22] In the circumstances I make the following order:

> The defendants are liable, jointly, and severally, the one paying, the other to be absolved to pay to the plaintiffs the following amounts:
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> A:
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> (a) the first plaintiff, the sum of R544 673.14;
> (b) the second plaintiff, the sum of R167 928.18;
> (c) the third plaintiff, the sum of R36 773.37;
> (d) the fourth plaintiff, the sum of R75 416.78;
> (e) the fifth plaintiff, the sum of R81 251.30;
> (f) the sixth plaintiff, the sum of R57 071.37;
> (g) the seventh plaintiff, the sun of R43 428.31;
> (h) the eighth plaintiff, the sum of R29 679.74;
> (i) the ninth plaintiff, the sum of R108 483.39.
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> B:

To each plaintiff, interest on the sum awarded at the rate of 7.0 per cent per annum, calculated from the 28th May 2021 to date of payment.

C:

Each plaintiffs' costs of suit.

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Lopes J

Dates of hearing:	8th and 9th May 2023.
Date of judgment:	16th May 2023.
For the plaintiffs:	Ms K Hennesey (instructed by Kenneth Watt Attorneys).
For the defendants:	Mr K Naidu (instructed by Kumaran Pillay Attorneys).