

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO.

(2) OF INTEREST TO OTHER JUDGES: YES/NO.

(3) REVISED.

22/09/2014

Small
SIGNATURE

IN THE NORTH GAUTENG HIGH COURT, PRETORIA

REPUBLIC OF SOUTH AFRICA

CASE NO: 16556/10

In the matter between:

GERT PETRUS JACOBUS VAN ASWEGEN Applicant

And

ADV CHRIS VAN COLLER First Respondent

JACOBUS HENDRIK SCHABORT Second Respondent

THEODORE WILLEM VD HEEVER Third Respondent

PAUL DANEEL KRUGER Fourth Respondent

PHILLIP DAVID BERMAN Fifth Respondent

MAHOMED BHAROOCHI Sixth Respondent

HUSEIN BHAROOCHI Seventh Respondent

**THE LIQUIDATORS OF SPITSKOP
VILLAGE PROPERTIES (IN LIQUIDATION)** Eight Respondent

**MASTER OF NORTH GAUTENG
HIGH COURT** Ninth Respondent

**MASTER OF THE HIGH COURT
CAPE TOWN** Tenth Respondent

MR W L STEENKAMP Eleventh Respondent

In re:

CASE NO: 63649/09

M BHAROOCHI AND ANOTHER Applicants

and

MATTHYS ISAC CRONJE N.O.

First Intervening Party

DULCE VITA CC

Second Intervening Party

J U D G M E N T

Ismail J:

[1] On the 10 December 2010, Pretorius J made the following order:

1. That the applicant be granted leave to intervene as a party in case number 63649/09;
2. That the order of this court under case no 963649/09 which order was made on 15 October 2009 declaring the syndication scheme conducted in Spitskop Village (Pty) Ltd unlawful, is rescinded and set aside;

3. That a *rule nisi* issued was returnable on the 9 February 2011, calling upon any party to show cause why the following order should not be made final:

3.1 That the syndication scheme conducted in the name of the Spitskop Village (Pty) Ltd (in liquidation) is hereby declared illegal in terms of the provisions of the Bank Act, No 94 of 1990 and in terms of the regulations issued in terms of the Harmful Business Practice Act No 71 of 1988.

3.2 That all agreements of whatsoever nature pursuant to the syndication scheme known as Spitskop Village (Pty) Ltd, are hereby declared *null and void ab initio*, such agreements to include:

3.2.1 Agreements in terms of which investors made investments in the scheme;

3.2.2 The trust deed of the Steelport Debenture Trust, which was registered in terms of the Trust Property Control Act 57 of 1988 by the Ninth Respondent with registration number IT 7939/07;

3.2.3 The mortgage bond over the property of Spitskop Village (Pty) Ltd in favour of the Steelport Debenture Trust.

4. That the rejection of the claims of the applicant and 1212 other debenture creditors whose claims were submitted for proof by the debenture trustee, at the first meeting of creditors in the estate of Spitskop Village Properties (sic) Ltd (in liquidation) (hereinafter "the Company") on 10 November 2009 before the 11th respondent as an officer of the 10th respondent, be set aside;
5. That the claim of the applicant and other debenture holders of Spitskop Village Properties Ltd as lodged for proof at the first meeting of creditors but rejected by the Master, be resubmitted at a special meeting of creditors, as claims proved or settled as prescribed in section 78 of the Insolvency Act No 24 of 1936.
6. That all further meetings of creditors and members of the company be held before the 9th respondent in Pretoria.
7. That pending any further orders which may be made in case number 63549/09:

- 7.1 The STEELPORT DEBENTURE TRUST which was registered In terms of the trust Property Control Act 57 of 1988 by the 9th respondent with registration number IT 7939/07, shall continue to be recognized as a trust in terms it (sic) Trust Deed (hereinafter "the Trust Deed");
- 7.2 That the 9th respondent appoints a suitable person, excluding Mr Edeling, as trustee of the STEELPOORT DEBENTURE TRUST;
8. That leave is granted to the applicant and other debenture holders of the company, whether through the trustee of the STEELPOORT DEBENTURE TRUST or otherwise, to supplement their proof of claim documents already submitted to the 10th respondent by:
- 8.1 stating the amounts received by them from the company by way of interest;
- 8.2 Relying on further alternative cause of action based on *condictio* arising from their investment transactions in the allegedly illegal scheme operated by the company.
9. That the rule nisi must be served by publication once in the Sunday

times and in the Rapport newspapers and must be advertised on the website of Spitskop Village (Pty) Ltd, in liquidation and must be served on the trustee of the Steelport Debenture Trust as soon as the trustee has been appointed by the 9th respondent.

10. The costs of this application including the costs of the postponement of 10 November 2010 are reserved..

Background

[2] A property purchased for R1 057 000, 00 by a Blue Dot (Pty) Ltd wherein Mr Lamprecht and Mr van Zyl were the directors was sold to Spitskop Village (Pty) Ltd [hereinafter referred to as Spitskop] for the sum of R118 300 000,00.

[3] An amount of R425 000 000,00 was needed in order to develop the property. The amount of R118 300 000, 00 was raised from investors funding by the promoters Blue Zone Property Investment (Pty) Ltd. [hereinafter referred to as Bluezone]

In order to raise money a unit consisting of a share linked to a debenture in

the company was issued valued at R1000,00. An investor was entitled to invest a minimum amount of R1000 000.00 in order to purchase this combination of a share and debenture.

[4] The amount of R118 300 000, 00, the full sale price, was paid over by Spitskop even before the property was transferred. Notwithstanding the disclosure document specifying that a deposit would only be paid.

[5] It is worthy of mentioning that both Mr Lamprecht and Mr van Zyl were directors of Blue Zone.

[6] From the sale of land from Blue Dot to Spitskop a profit of R117 million was made. Her Ladyship Madam Justice Pretorius in her judgment referred to the transaction as not being “an arm’s length transaction”.

[7] 1213 investors invested more than R350 000 000,00 in Spitskop. On 21 August 2010 Spitskop was liquidated by an order of this Honourable Court.

[8] The sixth and seventh respondents instituted motion proceedings against the liquidators of Spitskop , namely the third to fifth respondents and the eight respondent in which they sought an order to declare the scheme operated by Spitskop (in liquidation) an unlawful scheme.

[9] The provisional liquidators without consulting investors or creditors instructed counsel to appear on their behalf and they instructed counsel not to oppose the application.

[10] The order declaring the scheme unlawful was granted by the Court on the 15 October 2009

[11] The applicant applied to intervene as a party in the application and to set aside the order declaring the scheme unlawful.

[12] The sixth and seventh respondents who initially applied to have the Spitskop scheme unlawful did not participate in any further proceedings and are not involved in this application.

[13] The application was heard by Pretorius J who delivered her judgment in which she set aside the order declaring the scheme unlawful and issued a *rule nisi*, supra.

[14] The applicant, Mr van Aswegen, thereafter did not participate in these proceedings.

[15] The Second Intervening party successfully applied to intervene in this application in order to show cause why the *rule nisi* should not be made final.

This Application

[16] At the commencement of this matter Mr Puckrin SC acting on behalf of the 4th respondent informed me that the original application brought by Mr van Aswegen was settled.

[17] The issue to be determined is whether the property development scheme was legal or whether it was unlawful. If it was found to be an unlawful scheme, what the consequences thereof would be.

[18] The parties provided me with detailed heads of argument in this matter. I am indebted to them for their efforts in this regard. Their heads were both useful and beneficial to the court.

[19] Mr Puckrin on behalf of the 4th and eight respondent submitted that The development scheme was illegal for principally three reasons. Namely that it contravened the Government gazette Notice 459/2006 which was issued in terms of the Consumer Affairs Act 1988 (the Unfair Business

Practice Act) ; secondly that it contravened the South African Reserve Bank's Act and that the liquidators of Spitskop had established that the directors in the disclosure document failed to disclose fundamental information to the investors. This non-disclosure on their part amounts to a fraudulent misrepresentation and concomitantly the entire syndication scheme should be declared illegal.

[20] The failure to disclose pivotal information to the investors, such as that the lion's share of monies was already received from investors, prior to the trust being registered. Mr Puckrin submitted that 80% of investments were received from the investors prior to the registration of the trust deed. The disclosure document suggested that the trust was registered, however the trust was only registered in August 2007.

[21] The investors were not informed that a land claim existed over Spitskop properties. This fact was withheld by the controllers of the scheme who were privy thereto. This was not mentioned in the disclosure document. At the time when the investors made their investments this was not revealed to them.

[22] A further aspect which was not revealed to the investors was the aspect that mining rights were registered over the properties in favour of Anglo American. This aspect was also within the knowledge of the directors

of Spitskop and/or its advisors and these mining rights were recorded in the title deeds of the land in question. Prior to the sale of the property by the original owner [Mr Joubert] to Blue Dot Property CC the former was interdicted from erecting dwellings on the property by African Gold and Base Metal Holding Ltd.

[23] Further an interdict was registered against Spitskop farm as a whole. Mr Lamprecht one of the director of Spitskop who conducted a due diligence did not reveal this interdict over the property in his due diligence report.

[24] The failure to disclose the abovementioned aspects to the investors it argued on behalf of the applicants constituted a deliberate withholding of vital information which *per se* rendered the Spitskop syndication scheme illegal *ab initio*.

[25] It was submitted that the two valuations which were attached to the disclosure documents did not comply with the requirements with the Government Notice. These valuations were disclosed to prospective investors regarding the properties to be developed. It was suggested that the valuations reflected a false value of the properties and was designed to mislead the investors of the true value of the properties. This in itself it was suggested was sufficient in itself to render the entire scheme illegal.

[26] I do not propose to deal with each and every submission raised by the applicants during their address in court or to what was referred to in the applicant's heads. My failure in so doing should not be construed as the court not having considered those submissions. On the contrary they are not mentioned simply for the purpose of prolixity. The same would apply to those submissions raised by Mr Pretorius on behalf of the respondent.

[27] Her Ladyship Justice Pretorius in her judgment alluded to the following:

"The Government gazette of 13 March 2006 set out the requirements pertaining to the minimum information that must be contained in a property syndication disclosure document.....funds may only be withdrawn from the trust account to pay for the transfer of the immovable property into the name of the buyer.

Spitskops' own documents indicated that millions of rand had been paid out contrary to the provisions of the Government Gazette before transfer taken place..."

Further on in her judgment the learned judge stated:

"Both Mr Lamprecht and Mr van Zyl were directors of Blue Zone. On 21 August 2009 Spitskop was finally wound up by court. It is clear that there was no arms length transaction when Spitskop was sold to the respondent. This was in contravention of the provisions of the Government Gazette".

[28] Mr Pretorius in his response to these submissions which were made on behalf of the fourth applicant relied heavily upon the decision of *Petersen and another v Classens and other* 2006 (5) SA 191 (C). in his heads he submitted that “the allegations raised by the liquidators is to a large extent on all fours with the present application”.

To this end he relied upon this judgment in support of the view that the contract was not illegal *vis a vis* an innocent party. He referred to various paragraphs of the judgment which included paragraphs [14]; [16]; [17]; [19]; [24] and [37] thereof. I do not propose to include each of the passages relied upon by counsel save that I will incorporate paragraph [19] thereof.

[29] At par [19] of the Petersen judgment the following is stated:

“ At common law, an agreement is unenforceable if the ultimate purpose of the parties is prohibited by common law.. It is noteworthy, furthermore, that this general rule has been relaxed to some extent, in the situation where one party enters into the contract for an illegal purpose but the other knows nothing of that purpose and is entirely innocent. In such a case, the innocent party can enforce the contract but the guilty party cannot [Ericson v Gernie Motors (Edms) Beperk, 1986 (4) SA 67 (A)] .”

[30] Mr Pretorius submitted that the fraud was perpetrated by the directors

of Spitskop and innocent parties such as the second intervening party were unaware of their shenanigans. As far as the second intervening party was concerned the company was legally registered and its objects was lawful namely a property investment and development ; Blue Zone the promoting company was registered and it promoted the Steelpoort Development. He submitted that as far as the general public and in particular the second intervening party were concerned the company was a lawful entity with legitimate objects. The Disclosure Document contained nothing in it to suggest to investors that something other than a legitimate property development was intended.

This document on the face thereof was also a lawful document issued in terms of the relevant legislation.

[31] The applicant also relied upon the Scheme infringing the provisions of the Banks Act. The fourth respondent attached an inspection report from the South African Reserve Bank to his papers relating Spitskop Village Properties. In that report the inspectors of the Reserve Bank concluded: " We are satisfied that the company (Spitskop Village Properties) ably assisted by Blue Zone public, conducted the business of a bank without being registered as such "

It was submitted on behalf of the fourth applicant that the S. A. Reserve

Bank found that the debentures as defined in the disclosure document and as terms of which an equal amount or part thereof will conditionally repaid in terms of an agreement between the investor and the debenture holder and the company.

The S.A. Reserve Bank also opined that the instrument issued by Spitskop did not qualify as a debenture in terms of the Companies Act. The debentures were not issued and did not comply with the provision of the Companies Act in that it did not meet the requirements of a valid prospectus as contained in various section of the Companies Act such as section 148 and 149(1) and sections 153 to 158 thereof.

[32] The debentures issued by the Spitskop scheme was issued for a period of three years.

[33] The Spitskop scheme was not exempt in terms of various Government Notices relating to securitization schemes and the designation of an activity not falling within the meaning of a Bank. Only schemes as specified in those Government Gazettes are exempted from the business of a Bank.

[34] Commercial paper as defined in those Notices, namely Government notice 30628 of 1 January 2008 and its predecessor Government Notice

R681 of 4 June 2004, and Government Gazette 26415, as including debentures or any interest bearing written acknowledgement of debt issued for a fixed term in accordance with the Companies Act.

Certain conditions relate to the issue of debentures. If a commercial paper is issued in denominations of less than R1 million it can only be done in one of the following ways:

1. It is listed on a licensed financial exchange;
2. It is endorsed by a bank;
3. It is issued for a period of longer than five years; or
4. It is backed by an explicit national Government guarantee.

[35] It was contended on behalf of the fourth applicant that no person would conduct the business of a bank unless such a person is a public company and is registered as a bank. Section 11 of the Bank's Act reads as follows:

“ registration a prerequisite for conducting a business of a bank:

- (1) Subject to the provisions of section 18(a), no person shall conduct the business of a bank unless such a person is a public company and is registered as a bank in term of the Act
- (2) Any person who contravenes a provision of subsection (1) shall be guilty of an offence”

[36] Mr Pretorius on behalf of the intervening party relied upon an opinion which was obtained from Adv Wasserman SC which was attached to his heads of argument. The opinion relates to the question of whether the business conducted by the Consultant [Blue Zone Property Investments (Pty) Ltd] constituted a banking business. At paragraph 16 of the opinion Mr Wassermann concluded that the business conducted by consultant did not constitute a banking business. He sets out his reasons for so concluding as follow:

(1) As is evident from the preamble, the Legislature intended to provide for regulations and supervision of the business of public companies taking deposits from the public.

(2) The subscription paid by investors do not fall within the definition of "deposit":

2.1 The investors subscribe for equity in a company.

2.2 The subscription paid is not repayable on demand and will only be redeemed in the circumstances set out above. Consultant is accordingly not obliged to repay any portion of the

subscription on demand; although the holder of a unit is entitled to interest in accordance with the debenture terms, the investment is only realized on completion of the project.

- (3) Notwithstanding the fact that a portion of the subscription paid is invested for purposes of facilitating interest payments to the investors, the funds are not used to extend loans or for purposes of effecting “ investments” on behalf of investors as contended by the Act.

Mr Puckrin submitted that the opinion of Mr Wassermann SC was merely an opinion and that it was of no evidentiary value. The opinion failed to consider two important aspects, namely:

The opinion does not consider the regulations to the Bank Act 94 of 1990 and what is considered to be the business of a Bank, and what is excluded.

[37] It is clear that the debenture issued in this matter was for amounts substantially less than a R1m. It should have been for a period of at least five years and not three years. Furthermore it should have been listed on a financial exchange.

[38] I am inclined to agree with Mr Puckrin's that the opinion of Mr Wassermann with due respect to the latter is simply what it purports to be namely his opinion.

[39] A further ground which the fourth respondent relied upon declaring the scheme to be illegal was based on common law fraud. In this regard without repeating certain aspects already dealt with hereinbefore the question of the with-holding of the casts mining rights claim; that a land claim existed over the property and an interdict was registered over portions 6 and 7 of Spitskop farm. Furthermore the misrepresentation relating to the valuation of the property. These aspects were known to the controllers and perpetrators of the scheme who deliberately withheld this from the investors. This begs the question would the investors have invested in the scheme if they were aware of these aspects.

[40] It was submitted that the consequences thereof was that the scheme was contrary to public policy and therefore *contra bonis mores* and therefore void *ab initio*. In this regard the principle set out in decision of *Visser en Andere v Rosseau en Andere* 1990 (1) SA 139 (AD) at 148 F:
" Ter inleiding van die bespreking, wil ek net enkele oorwegings wys waaroor die partye dit met mekaar eens is. Dit is nie die gedrang nie dat die likwadeurs korrek opgetree het deur eise van verloorder-kwekers wat op 'n kontraktuele grondslag gebaseer was, te verwerp, op grond van die onwettigheid van die skema: *ex turpis causa non oritur*

actio. Eise van die verloorders vir die terugbetaling aan hulle van die bedrae wat hulle aan die maatskappy betaal het by wyse van die koopprys van aktiveerders, staan op 'n ander grondslag. Elke eis van hierdie aard sou wees 'n *condictio ob turpem causam*. Teen so 'n eis is daar as uitgangspunt 'n verweer beskikbaar wat uitgedruk word in die reel *in pari delicto portior est condictio defendentis*. Volgens die beslissing in *Jajbhai v Cassim* 1939 AD 537 is die *in pari delicto*-reel egter nie 'n reel wat daarvan te verslap, ten einde 'n *condictio* te laat slag, wanneer sodanige verslapping aangewese is met die oog op oorwegings van die openbare beleid, die vermyding van onregverdige verryking van die een party ten koste van die ander, en die bewerkstelling van die geregtigheid tussen die indiwudue wat betrokke is by die gedingvoering. Daar was geen suggestive in die huidige saak dat algemene benadering van die Hof in *Jajbhay v Cassim*-saak supra in beginsel nie op die feite in hierdie geval toegepas behoort te word nie...”

[41] In See: *Phillips v Botha* [1999] 1 All SA 524 (A) at 531g-h where the court referred to a passage from paragraph 644 from Wessels *The Law of Contract in South* to the effect:

“ An illegal contract is a vicious contract. It is one that the law forbids. The law is not indifferent to it. Not only does the law refuse to enforce it, but it refuses to help a party who has been the victim of such a contract . The Court will have nothing to do with rights based directly or indirectly upon an illegal contract...”

See also : *Kennedy v Steenkamp* 1936 CPD 113 at 117 where Watermeyer AJP stated:

“.. In English law such a promise would probably not be enforceable because (according to authorities such as Pollock on *Contract*, 9th Ed., p.450; Halsbury's *Laws of England*, Hailsham ed., vol 7 sec 280) a promissory note given in respect of a debt arising out of an illegal transaction is tainted with illegality and cannot be enforced.”

[42] In the matter of *Schutz and de Jager v Edelstein* 1942 CPD 126 at 131 the court stated:

“ Section 141 imposes a penal sanction and is one of a number of sections which elucidate the policy underlying the statute. The test whether a contract of this nature is void or not is expressed by Wessels Law of Contract (Vol 1, sec 475) as:

“ It is submitted that the correct view is to regard the question as one of legislative intent, and therefore if the statute is passed with the object of protecting the public or with a view to putting a stop to certain actual dealings, then a contract founded on such an act is void even though there is no express prohibition of such a contract in the statute.”

[43] In my view there had been a deliberate breach of the Unfair Business Practice Act and the Banks Act by the directors of the scheme to the detriment of the investor. Mr Pretorius submitted that if the directors of the company infringed the Banks Act they could be prosecuted. The sanction does not render a valid agreement becoming illegal thereby rendering a commercial property to the status of a farming property..

[44] The penal sanctions which the law imposes in itself may not be adequate to protect the innocent public where the scheme is *contra bonis mores*. In this regard see the passage quoted from Wessels in paragraph [41] *supra* ; *Visser en Andere v Rouseau en Andere* ; *Schuurhout v Minister of Justice* 1926 (AD) 99 at 109 and *Rosseau and Andere v Malan en 'n Ander* 1989 (2) SA 451 (C) at 459E.

[45] I am of the view that the fourth respondent had established that the *rule nisi* which was authorized in this matter should be confirmed.

The issue of Costs.

[46] On behalf of the fourth respondent it was contended that if the court were to find that the scheme was illegal and thereby confirm the *rule nisi* the respondent will seek an order for costs against the second intervening party, alternatively that the costs incurred be taxed out of the estate of Spitskop Village Properties Ltd.

It was also submitted that it was necessary for the respondents to engage the services of three counsel in view of the large quantum involved in the matter.

Mr Pretorius submitted that the second intervening party should not be saddled with the costs as it acted not only on its own behalf but on behalf of all the investors. He submitted that the second intervening party did not as he put it go on “ a wild goose chase” in opposing the matter.

[47] I am inclined to agree with Mr Pretorius that the costs of this application should not be placed at the door of the second intervening party and to that extent I believe that the fourth respondent's alternative argument regarding costs should prevail namely that the costs should be taxed out of the estate of Spitskop Village .

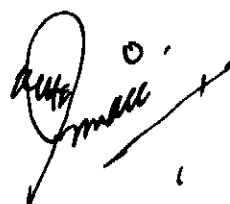
[48] I also see no reason why the costs of three counsel should not be allowed in view of the magnitude of the quantum and the complexity of the legal issues involved . To this extent I am indebted to all counsel involved in this matter for their valuable assistance in compiling their heads of argument and for their input in this matter.

[49] I was informed that this matter was previously on the roll during November and December 2010 and that the costs were reserved. The costs of those appearances are also to be paid from the estate of Spitskop Village which costs should include the employment of three counsel.

[50] Regarding the issue of the costs of the main application, this was settled between the applicant and the respondents, in that the applicant was substantially successful in that application, to the extent that the order of 15 October 2009 was set aside. The respondents agree that the applicant should be entitled to the taxed party and party costs in the estate.

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

- (i) The rule nisi issued by Pretorius J on the 10 December 2010 is confirmed (particularly prayer 3 thereof);
- (ii) That the fourth respondent should be awarded costs on a party and party scale, such costs to include the costs employment of three counsel. These costs should be paid from the estate of Spitskop Village (Pty) Ltd.
- (iii) The fourth respondent should also be awarded the cost which were reserved during November and December 2010.



A handwritten signature in black ink, appearing to read 'A. J. M. M. M.', is written above a horizontal line. The signature is stylized and includes a small circle above the second 'M'.

Appearances:*For the Fourth and eight respondents:*

Adv C Puckrin SC; Adv M A Badenhorst SC and Adv J Hershensohn
instructed by Schabort Inc, Sunnyside, Pretoria

For the second intervening party:

Adv B Pretorius and Adv J Gouws instructed by J P Kruishaar , Pretoria

Date of hearing : 27 July 2011

Date of Judgment: 22 September 2011.