



CONSTITUTIONAL COURT OF SOUTH AFRICA

Christian Findlay Bester N.O. v Quintado 120 (Pty) Limited

CCT 160/21

Date of judgment: 13 December 2021

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On Monday, 13 December 2021 at 10h00, the Constitutional Court handed down judgment in an application for leave to appeal against a judgment of the High Court of South Africa, Western Cape Division, Cape Town, which declined to grant a final liquidation order of the respondent, Quintado 120 (Pty) Ltd (Quintado).

The applicants are the trustees of the insolvent estate of Mr Petrus Serdyn Louw and Mrs Martha Maria Sophia Louw (Louw insolvent estate). Mr Louw, a chartered accountant, was the co-founder of Louw & Cronje Incorporated, a successful auditing firm in Porterville, Western Cape. Mr Louw was also the co-director of Quintado with his brother-in-law, Mr Markram Jan Kellerman. Mr Louw, through Quintado, ran a fraudulent business for tax fraud purposes. He further defrauded his clients from his auditing firm and transferred their funds into the bank account of Quintado. From January 2015 to November 2018, money was transferred from Mr Louw's bank account to Quintado and vice versa. R31 million flowed from him into Quintado, and R17 million flowed back from Quintado to him. Ultimately, Mr Louw transferred approximately R13.7 million more into Quintado's bank account than Quintado transferred back to his account.

The trustees of the Louw insolvent estate applied to the High Court for Quintado to be placed under provisional liquidation. They premised its standing to bring the application on the basis that Quintado was its debtor. In the alternative, if Quintado was found to be solvent, they argued that it would be just and equitable for Quintado to be wound up in terms of section 81(1)(c)(ii) of the Companies Act.

The High Court accepted that Mr Louw had defrauded his clients of R110 million over a period of six years and that he made use of Quintado to hide his fraudulent activities. The High Court held that the fact that Mr Kellerman was a non-executive director was irrelevant as both directors had the same fiduciary duties which Mr Kellerman had effectively abandoned. Accordingly, the Court held that it was just and equitable to grant a winding up order in terms of section 81(1)(c)(ii) of the Companies Act. A provisional liquidation order was thus issued with a rule nisi calling on interested parties to show cause why the order should not be made final.

On the return date, the High Court found the version by the Louw insolvent estate to be improbable. The Court rejected the allegation that Mr Kellerman had been complicit in the fraudulent activities, and accepted that the flow of funds was for Mr Louw's benefit. It further rejected the argument that Mr Louw's actions amounted to those of the company. The High Court held that, when determining the directing mind of the company, a pragmatic approach should be followed and each case must be read within the context of its facts. The High Court, having considered the test, held that: (a) the fraudulent activities were not within Quintado's field of operation; (b) the fraudulent tax scheme defrauded Quintado; and (c) the actions of the director was not by design or result for Quintado's benefit. Thus, the application for the winding up of Quintado was dismissed as the applicants had not established that they had an undisputed claim against Quintado. The applicants approached the Supreme Court of Appeal for leave to appeal but this was refused. An application for reconsideration of that order was also dismissed.

Before this Court, the applicants submitted that Quintado is indebted to the insolvent estate and, therefore, they have standing to seek an order for the winding up of Quintado. To establish jurisdiction, the applicants argued that the directing mind of the company test, which is used to determine whether, in law, the acts of those who purport to represent a company can be attributed to the company, should be developed into a more flexible test. Furthermore, if the High Court applied the flexible test, Mr Louw's conduct could be attributed to Quintado. They also argued that the email exchanges between Quintado's directors are proof of their involvement in the fraud. Moreover, the High Court erred when it held that the money channelled through Quintado's bank account was not Mr Louw's money, but rather his clients' stolen money. As a matter of policy, it was argued that it will not be just for each of Mr Louw's clients to establish where the funds ended up after being paid into Quintado's bank account.

Quintado argued that the debate about the correct test to determine the directing mind of the company is academic as this is an enrichment claim. On the facts, Mr Louw was not impoverished by the payments made to Quintado and Quintado was not enriched by them. The money transferred from Mr Louw to Quintado did not belong to Mr Louw, it was the money he had stolen from his clients; therefore, Mr Louw was not impoverished by the payments. Quintado was not enriched, as it was only used as a conduit to make payments to another company which Mr Louw had majority shares in. Therefore, no cause of action was made for the enrichment claim. It also argued that Mr Kellerman did not know of the fraud due to his implicit trust in Mr Louw.

In a unanimous judgment penned by Mhlantla J, the Constitutional Court refused to grant leave to appeal on the basis that this Court's jurisdiction is not engaged. Mhlantla J considered the argument that the directing mind of the company test should be developed to accord with the Constitution into a more flexible test and held: first, the High Court recognised that the test, as established by the case of *Canadian Dredge*, is already flexible and a pragmatic approach is preferred. Second, that the applicants were unable to direct this Court to the violation of any constitutional rights, other than the purported infringement of section 34. Therefore, no constitutional issue is raised.

The arguable points of law of general public importance that this Court ought to consider, according to the applicants, are all related to whether the directing mind of the company doctrine has been met. This Court held that, as there are three fundamental factual disputes all related to the arguable point of law, this Court would first have to determine the factual disputes before determining whether its jurisdiction is engaged – something that is not permissible. This matter, in reality, turns on factual disputes and accordingly does not engage this Court's jurisdiction.

As a result, the application for leave to appeal was dismissed with costs.