IN THE GAUTENG DIVISION HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

Case Number: 56204/2008

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

………………… ……………………
DATE **SIGNATURE**

In the matter between:

NATIONAL UNION OF MINE WORKERS	**FIRST PLAINTIFF**
MOROANE, S AND 199 OTHERS	**SECOND PLAINTIFF**
and	
VAN ROOYEN, GYSBERT	**FIRST DEFENDANT**
BOLTMAN, SHALK JACOBUS	**SECOND DEFENDANT**

JUDGMENT

MOLEFE J:

[1] The plaintiffs instituted an alternative claim against the first defendant for an order declaring the first defendant liable jointly and severally with Billard Contractors CC

("Billard") in respect of any debt arising out of the judgment debt of the Labour Court in its case number JS 929/02.

Background Facts

[2] The first plaintiff is a trade union and the second and further plaintiffs are former employees of Billard, a labour broker. The first defendant has the controlling interest in Midway Bricks (Pty) Ltd ("Midway") and has since 22 October 2002 been the sole member of Billard. Prior to the 22 October 2002, the second defendant and one Mr Leonard Phungu were the members of Billard. The second defendant was a practicing attorney who had an interest in labour work. During 1999, he concluded an agreement on behalf of Billard, with Midway in terms of which Billard as a labour broker provided the labour for the operations of Midway.

[3] On 29 May 2002, Billard, after a series of unprotected strikes, dismissed the second up to the 199th plaintiff's. The plaintiffs challenged the lawfulness of their dismissal against Billard in the Labour Court on 13 August 2002. During the proceedings the plaintiff brought an application for the joinder of Midway as a second defendant. First defendant did not wish judgment to be taken against Billard by default and he took over the members' interest in order to allow Billard to defend the matter on the merits. On 25 April 2006, the Labour Court ordered Billard to reinstate the second to the fortieth plaintiff effective from 26 April 2005 and that compensation be paid to the 41st and further plaintiffs in an amount equal to two weeks remuneration, calculated as at the date of dismissal as well as contribution to the plaintiffs' costs.

[4] On 26 May 2006 when the plaintiffs sought to obtain performance of the Labour Court judgment, Billard did not comply stating that it had been dormant since 29 May 2002 and that it had no assets nor clients since the dismissal of the workers on 29 May 2002. Billard has since been placed under final winding-up. Summons was served on both defendants on 3 December 2008.

[5] The plaintiffs in their main action relied on sections 64 and 65 of the Close Corporations Act 69 of 1984 ("the Act"). They sought to hold the members of Billard personally liable for the judgment debt on the basis that they had grossly abused Billard's juristic personality and that the business of Billard had been operated recklessly, alternatively, grossly negligently, alternatively, for a fraudulent purpose or with intent to defraud the plaintiffs.

[6] The defendants' special plea of prescription was decided separately in terms of rule 33(4) of the Uniform Rules of Court and the honourable Preller J found that the claim had prescribed.

What remains for determination now is the plaintiffs' alternative claim directed against the first defendant only and based on section 63(h) of the Act.

[7] Section 63 of the Act provides:

> *"- - - - the following persons shall in the following circumstances with a corporation be jointly and severally liable for the specified debts of the corporation.*
>
> *(h) where the office of the accounting officer of the corporation is vacant for a period of six months, any person who at anytime during that period was a*

> *member and aware of the vacancy, and who at the expiration of the period is still a member, shall be so liable for every debt of the corporation incurred during such existence of the vacancy and for every such debt thereafter incurred while the vacancy continues and he is still a member".*

[8] The plaintiffs' case is that from 29 February 2000 to the present, the office of the accounting officer of Billard has been vacant. The plaintiffs further allege that the vacancy existed when the first defendant became a member of Billard on 22 October 2002 and that he had been aware of the vacancy and its duration, and therefore he is personally liable for the judgment debt in the Labour Court orders.

[9] The first defendant denies all these allegations and pleads that KPMG Chartered Accountants ("KPMG") has been appointed as accounting officers since Billard's incorporation and was never removed as accounting officers.

[10] During August 2011, Mr Stephanus Johannes Martinus de Beer, deposed to an affidavit in the proceedings in the Labour Court between the plaintiffs, Billard and the first defendant. The plaintiffs in an application sought the committal of the first defendant to gaol for contempt of court in relation to the Labour Court order referred to above. Mr de Beer's affidavit was filed in the Labour Court and the first respondent (defendant) relied on it resisting the application. In the affidavit, Mr de Beer stated that at the time of the registration of Billard, the accounting officer was KPMG and he was employed by KPMG at that time. When the first defendant took over the member's interest on 22 October 2002, KPMG was still the accounting officer[1]. He also stated

[1] Bundle page 18 par 3 and 5

that to the best of his knowledge Billard never traded since then and that *"we have never compiled any financial statements for the close corporation".*

[11] Mr de Beer testified at the Labour Court hearing on 8 September 2011 and during his evidence in chief he stated that he had been a partner at KPMG until August 2006, and had personal knowledge relating to the close corporation Billard Contractors. He testified that "*Billard Contractors is a CC that was registered when we were still at KPMG, were appointed as the accountant of Billard, we never did any accounting or tax work for Billard*[2]*".*

[12] Mr de Beer was the plaintiffs' only witness at the trial and in his examination in chief he admitted the contents of the Labour Court Case No J2801/07 transcript in Bundle "C" relating to his testimony as correct and confirmed that he stood by his evidence in the transcript.

[13] Under cross-examination Mr de Beer was referred to Bundle "C" pages 1 – 16

a) page 7 is a letter to the Registrar of Close Corporation dated 18 October 1999 wherein KPMG accepted appointment as accounting officer of Billard;

b) page 5 is a company report request dated 15 April 2015 and KPMG status as accounting officers is listed as "*current*";

c) pages 8 and 15 are tax invoices and pages 9 and 16 are related remittance advices. The tax invoices each reflect a fee owing to KPMG services (Proprietary) Limited, not KPMG Chartered Accountants;

[2] Exhibit "C" page 23 lines 6-8

d) page 10 is a letter sent by DPU Coetzer on behalf of KPMG (Eiendoms) Beperk dated 1 February 2002, informing Billard that a provisional tax returns for the period "*2002 Second Period"* had been filed on that day.

He testified that he was not aware that KPMG resigned as when he left in 2006, KPMG was still Billard's accounting officer. He could not remember KPMG ever drawing up financial statements for Billard.

[14] Plaintiff's counsel[3] argued that the documents referred to in Bundle "C" are consistent with Mr de Beer's evidence and that neither KPMG Chartered Accountants nor KPMG Services (Pty) Limited performed any of the activities described in section 62 of the Act at any time. That means that for each financial year commencing with the year end February 2000 and including the year ended February 2007 (that is including the year when the Labour Court granted judgment against Billard); Billard did not submit/produce financial statements and KPMG did not carry out the duties that are specifically assigned to the accounting officer by section 62 of the Act. Counsel for the plaintiffs submitted that therefore, Billard's office of the accounting officer was vacant throughout the period from 29 February 2000 until it was placed in liquidation.

[15] Plaintiff's counsel relied on ***Airport Cold Storage (Pty) Limited v Ebrahim and Others 2008 (2) SA 303 (c)*** wherein Griesel J held:

> *"[38] To my mind, this approach is highly technical and formalistic. It is clearly the intention of the Act that there should be an accounting officer on a continuous basis; hence the provision in section 59 (3) of the Act that requires a vacancy to*

[3] Advocate JG van der Riet SC

> *be filled, 'within 28 days', and the provisions of section 63(h) imposing personal liability for the debts of the corporation on individual members where debts exist for more than six months. . . . It cannot be held that the name of someone as accounting officer is sufficient compliance with the provisions of the Act".*

Counsel argued that if the corporation does not utilize the services of the accounting officer to perform the duties provided for under section 62 of the Act on a continuous basis, the office is therefore vacant.

[16] Counsel for the first defendant[4] submitted that the ***Airport Cold Storage (Pty) Ltd*** case **supra** is different from this case in that in the ***Airport Cold Storage***, case the Ebrahims conceded that they did not appoint an accounting officer whereas in *casu*, KPMG was the appointed accounting officer.

It was counsel's argument that on 27 May 2002, Billard became dormant whilst KPMG was still listed as the current accounting officer. First defendant contends that the fact that the appointed accounting officer did not perform some of his duties did not mean that the position is vacant.

Common Cause Facts

[17] Billard was incorporated on 26 November 1999. According to Billard's founding statement the name of its accounting officer upon incorporation was KPMG. In a letter dated 18 October 1999, KPMG consented in writing to appointment as Billard's accounting officer.

[4] Advocate G L Pretorius SC

[18] The first defendant became a member of Billard on 22 October 2002. The debt for which the plaintiffs seek to hold the first defendant liable was incurred on 26 April 2006 when the Labour Court gave judgment in the plaintiffs' favour, including an order directing Billard to pay 25% of the plaintiffs' costs.

[19] Billard never traded since the dismissal of workers on 29 May 2002 and the plaintiffs' witness confirmed that "*we have never compiled any financial statements for the close corporation".* There is no evidence that KPMG compiled the financial reports for Billard. This is not surprising since Billard was dormant and had no clients. It is also common cause that KPMG never resigned as accounting officer.

[20] The crisp issue to be determined is whether Billard's office of the accounting officer was vacant and that the liability set out in the Labour court judgment was incurred during the existence of the vacancy and whilst the first defendant was still a member of Billard.

[21] Section 62 of the Act provides that:

"*62 Duties of accounting officers*

1) The accounting officer of a corporation shall, not later than three months after completion of the annual financial statements-

a) Subject to the provisions of section 58(2) (d),determine whether the annual financial statements are in agreement with the accounting records of the Corporation;

b) Review the appropriateness of the accounting policies represented to the accounting officer as having been applied in the preparation of the annual financial statements; and

c) Report in respect of paragraphs (a) and (b) to the corporation

2) (a) - - - - - -

(b) - - - - - -

3) If an accounting officer of a corporation –

a) at any time knows, or has reason to believe, that the corporation is not carrying on business or is not in operation and has no intention of resuming operations in the foreseeable future;

or; i) - - - - -

ii) - - - - -

iii) - - - - -

he or she shall forthwith by registered post report accordingly to the Registrar.

[22] It is common cause that since 29 May 2002, Billard became dormant and was not carrying on business and no annual financial statements were generated in terms of section 62 (1) (c) of the Act by KPMG. In my view, this does not mean that the office of the accounting officer was vacant and was not occupied due to failure by KPMG to generate annual financial statements for Billard. The fact that KPMG failed to report

that Billard was not carrying on business as prescribed by section 62 (3) (a) of the Act, does not make the office of the accounting officer vacant.

[23] The facts *in casu* are different from the ***Airport Cold Storage*** case **supra**. There was no registered accounting officer in the Airport case but only an acceptance of the appointments.

Furthermore, the Supreme Court of Appeal in ***Ebrahim v Airports Cold Storage (Pty) Ltd [2009] 1 ALL SA 330 (SCA)*** found it unnecessary to consider the issue of section 63 (h) (no accounting officer). I have read the papers of the transcript on which the plaintiffs rely for their view and am of the opinion that the inference that they purport to have been drawn from Mr de Beer's evidence is not justified.

[24] In *casu*, KPMG, had been appointed as accounting officers since the incorporation of Billard and had been active in performing the duties of an accounting officer for Billard. Since its appointment, provisional tax returns were filed and tax invoices and related remitted advices were sent to Billard. There is no merit on the submission that the office of the accounting officer was vacant by mere fact that KPMG compiled no financial reports for Billard and that the first defendant is to be held liable jointly and severally with Billard for the judgment debt of the Labour Court case number JS 929/02.

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

The plaintiffs' alternative claim against the first defendant based on Section 63 (h) of the Close Corporation Act 69 of 1984 that the first defendant is liable jointly *and severally with Billard Contractors CC, in respect of any debt arising out of the judgment of the Labour Court in its case number JS929/02 is dismissed with costs.*

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D S MOLEFE

JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel on behalf of Plaintiffs'	**:**	**Adv. JG van der Riet SC and AJ Lamplough**
Instructed by	**:**	**Cheadle Thompson & Haysom**
Counsel on behalf of Defendants'	**:**	**Adv. GC Pretorius SC**
Instructed by	**:**	**Van Zyl Roux & Hunter INC**
Date Heard	**:**	**30 April 2015**
Date Delivered	**:**	**10 July 2015**