



Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Regional Magistrates:	YES / NO
Circulate to Magistrates:	YES / NO

**IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape Division, Kimberley)**

Saakno / Case number: **CA & R 70/2012**
Datum verhoor/Date heard: **15 / 06 / 2015**
Datum gelewer/Date delivered **03 / 07 / 2015**

In the matter between:

ASCENDANT CASHFLOW SOLUTIONS (PTY) LTD Appellant

and

STEFANUS PHILLIPUS LOU HEYDENREICH N.O. First Respondent

MARIËTTE SOPHIA HEYDENREICH N.O. Second Respondent

Coram: Pakati, J et Erasmus, AJ

JUDGMENT

ERASMUS, AJ

- [1] The appellant is the plaintiff in an action instituted in the Magistrate's Court, Douglas, under Case Number 301/2011. The first and second respondents are the first and second defendants in the magistrate's court matter. I shall refer to the parties as the plaintiff and defendants. Both defendants were cited in both their capacities as trustees of the Heydenreich Family Trust (hereinafter referred to as 'the Trust') and in their personal capacities.
- [2] The plaintiff's claim in the Magistrate Court is based on the fact that a close corporation, previously known as "Wise-Up Deals 156 CC", owes the plaintiff certain monies. It is alleged that the name of "Wise-Up Deals 156 CC" was changed to SPL Construction CC (hereinafter referred to as "the close corporation").
- [3] It is alleged in the Particulars of Claim that the Trust is the sole member of the close corporation and that the first and second defendants, as trustees of the Trust, are liable, jointly and severally, for the liabilities of the close corporation as at the time of its deregistration. The liability of the defendants is based on the provisions of S26(5) of the Close Corporations Act¹ ('the Act') in that the persons who are members of such corporation shall

¹ No. 69 of 1984

be jointly and severally liable for the liabilities of the Close Corporation at the time of its deregistration if that close corporation is deregistered while having outstanding liabilities.

- [4] The defendants, in terms of rule 19(1) of the Magistrates' Court Rules, excepted to the Plaintiff's Particulars of Claim on the basis, *inter alia*, that it lacks averments which are necessary to sustain an action against the first and second defendants, both in their official capacities as trustees and in their personal capacities.

- [5] After having heard argument in respect of the exception, the Magistrate upheld the exception and made the following order:

"Die aansoek om eksepsie van die twee verweerders word gehandhaaf insoverre hulle eksepsie aanteken dat die eis teen hulle persoonlik ingestel word. Die eiser word verder gelas om sy stukke te wysig tot die mate dat dit 'n nexus of 'n skuldoorsaak openbaar ten aansien van die twee verweerders, nomino officio in hul amptelike hoedanighede.

Die eksepsie word dus gehandhaaf met koste betaalbaar deur die eiser."

[6] The Magistrate upheld the exception and provided reasons for doing so. He found that s26(5) of the Act had been amended to the effect that the automatic liability of the members of a close corporation has now fallen away. He also found that if the plaintiff intends instituting action against the members of the deregistered close corporation, he should do so in terms of other sections of the Act. As a result of this interpretation, he ruled that the Particulars of Claim did not contain any allegations establishing any *nexus* between the plaintiff and the defendants in their personal capacities. He further found that the *nexus* between the plaintiff and the Trust also appears to be unclear in the light of the amendments made to s26(5).

[7] The grounds for appeal are that the learned Magistrate erred in upholding the defendants' exception and that he erred in finding that the Particulars of Claim lacked the necessary averments to sustain a cause of action against the defendants. In amplification, the appellant specifically stated that the Magistrate erred in

7.1 finding that the trustees cannot become personally liable for the debts of the Trust under circumstances where the trustees are the members of a close

corporation and the close corporation was deregistered,

7.2 finding that s26(5) of the Close Corporations Act no longer finds application as it was amended in 1986 by the Close Corporations Amendment Act, No. 38 of 1986, without having due regard to the fact that the Close Corporations Amendment Act, No. 38 of 1986 merely substituted s26(5) with s6(1) of the said Act, and

7.3 not having due regard to the prevailing authority such as in the matter of **MOUTON v BOLAND BANK LIMITED**², where the Supreme Court of Appeal held that s26(5) of the Close Corporations Act, as amended, provided that if a corporation is deregistered while having outstanding liabilities, the members are liable therefor and that such liability is not extinguished upon re-registration of the corporation.

[8] The defendants did not oppose the appeal.

² 2001 (3) SA 877 (SCA)

[9] The first issue to be considered is whether the decision of the Magistrate is appealable in this instance. In terms of s83 of the Magistrate's Court Act³, a party to any civil suit or proceeding may appeal against:

9.1 any judgment of the nature described in s48 of the same Act,

9.2 any rule or order made in such suit or proceeding, having the effect of final judgment, including any order under chapter 9 and any order as to costs, and further; and

9.3 any decision overruling an exception, when the parties concerned consented to such an appeal before proceeding further in an action.

[10] The order of the Magistrate in this instance does not fall within the ambit of s48 of the Magistrate's Court Act. The question that needs to be determined is whether it is a rule or order made in a suit or proceeding, having the effect of final judgment, as envisaged in s83(b).

³ No. 32 of 1944

The test in this regard is whether it is such so as to *'dispose of any issue or any portion of the issue in the main action or suit'* or *'irreparably anticipates or precludes some of the relief which would or might be given at the hearing'*⁴. It is not only the form of the order that is relevant, but more so the effect of the order. If its effect is such that it makes it final to the extent that it is definitive of any issue or portion thereof in the main action, it is appealable.⁵

- [11] Ms Stanton, on behalf of the plaintiff, argued that at least the first portion of the learned Magistrate's order is final and thus appealable, because it is definitive of the relief sought against the defendants in their personal capacity. I agree as the order upholding the exception in respect of the claim against the defendants in their personal capacity precludes some of the relief which could or might be given at the hearing. The opportunity to amend the Particulars of Claim appears to have been granted in respect of the claim against the trustees in their official capacities only. The decision allowing the exception on the ground that no cause of action is disclosed against the defendants in their personal

⁴ Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd 1948 (1) SA 839 (A) at 870

⁵ Zweni v Minister of Law and Order 1993 (1) SA 523 (A) at 532H-I

capacity is fatal to the claim as pleaded and therefore final in its effect.⁶

[12] As the issue of the liability of the defendants in their capacities as trustees of the trust and in their personal capacities is closely interwoven, I deem it necessary to deal with both aspects.

[13] When deciding whether the Particulars of Claim lack averments which are necessary to sustain an action, it should be kept in mind that it is required that every pleading must contain a clear and concise statement of the material facts upon which the pleader relies for his claim. **In McKenzie v Farmers' Co-operative Meat Industries Ltd**⁷ the following definition of 'cause of action' was adopted by the Appellate Division:

'... every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.'

[14] The *facta probanda* (the facts which must be proved in order to disclose a cause of action) must be

⁶ Liquidators, Myburgh, Krohne & Co Ltd v Standard Bank of SA Ltd 1924 AD 226 at 229; Trope v South African Reserve Bank 1993 (3) SA 264 (A) at 270G

⁷ 1922 AD 16 at 22

distinguished from the *facta probantia* (the facts which prove them).⁸ As stated in **MAKGAE v SENTRABOER (KOÖPERATIEF) BPK**⁹, a plaintiff

'moet toesien dat die wesenlike feite (dit wil sê die facta probanda en nie die facta probantia of getuienis ter bewys van die facta probanda nie) van sy eis met voldoende duidelikheid en volledigheid uiteengesit word dat, indien die bestaan van sodanige feite aanvaar word, dit sy regsconklusie staaf en hom in regte sou moet laat slaag t a v die regshulp of uitspraak wat hy aanvra'.

[15] What the facts necessary to sustain an action in this case are, must be considered against the backdrop of the substantive law. If evidence can be led which can disclose a cause of action alleged in a pleading, that particular pleading is not excipiable.

[16] As it is alleged that the Trust is the sole member of the close corporation, it should first be determined whether a trust can be a member of a close corporation. Section 29 of the Act deals with the requirements of membership. In terms of subsection (1) thereof only natural persons may be members of a corporation and no juristic person or trustee of a trust *inter vivos* in that capacity, shall directly or indirectly hold a member's interest. Section 2 of Act 25 of 2005 amended s29(1) by

⁸ *Dusheiko v Milburn* 1964 (4) SA 648 at 658

⁹ 1981 (4) SA 239 (T) at 245D-E

making it subject to subsection (1A). The amendment further amended subsection (1A) by permitting a trustee of a trust *inter vivos* to be a member of the corporation subject to the limitations in paragraphs (a) to (d) of that sub-section. The relevant section reads as follows:

'29 Requirements for membership

(1) Subject to subsection (1A) or (2) (b) and (c), only natural persons may be members of a corporation and no juristic person or trustee of a trust inter vivos in that capacity shall directly or indirectly (whether through the instrumentality of a nominee or otherwise) hold a member's interest in a corporation.

(1A) A natural or juristic person in the capacity of a trustee of a trust inter vivos may be a member of a corporation: Provided that-

(a) no juristic person shall directly or indirectly be a beneficiary of that trust;

(b) the member concerned shall, as between himself or herself and the corporation, personally have all the obligations and rights of a member;

(c) the corporation shall not be obliged to observe or have any obligation in respect of any provision of or affecting the trust or any agreement between the trust and the member concerned of the corporation; and

(d) if at any time the number of natural persons at that time who are entitled to receive any benefit from the trust shall, when added to the number of members of the corporation at that time, exceed

10, the provisions of, and exemption under, this subsection shall cease to apply and shall not again become applicable notwithstanding any diminution in the number of members or beneficiaries.

[17] In terms of subsection (1A) a natural or juristic person, in the capacity of a trustee of a trust *inter vivos*, may be a member provided that certain conditions are met. The trustee is deemed to be the member of the close corporation and not the trust. The trustee is authorized to be the holder of the member's interest on condition that he personally accepts the obligations and rights of a member. In this instance it appears that the criteria have been met as the certificate issued by the Registrar of Companies & Close Corporations and which is attached to the Particulars of Claim, reflect the defendants as trustees of the Trust, as the members.

[18] In the decision of **THE SOUTH AFRICAN BANK OF ATHENS LTD v SALVADORA PROPERTIES NINETY NINE CC**¹⁰, Boruchowitz J stated the position as follows in paragraph [15]:

'As a matter of law, the respondent's assertion that the trust is the holder of the member's interest in the respondent is incorrect. That interest is held by Viviers in his capacity as the authorised representative trustee. Section 1 of the Act defines a member as a person qualified for membership of a corporation in terms of

¹⁰ (2009/41058) [2010] ZAGPJHC 37 (7 May 2010)

section 29, including “a trustee” or other legal representative. That definition envisages membership of the person representing the trust and not the trust itself.’

And continues in paragraph [19]

‘The fiduciary capacity in which the member becomes a member is something which has nothing to do with the close corporation. The primary fiduciary relationship which is owed is owed by the member personally to the close corporation. This is apparent from the wording of sub-section 29(1A)(b).’

[18] In the light of the position set out above, I agree with the submissions by Mrs. Stanton that the trustees in their personal capacities carry the rights and obligations of the close corporation. The upholding of the exception on the basis that the defendants were cited in their personal capacities is wrong.

[19] The cause of action is based on the provisions of s26(5) of the Act in that the defendants are, jointly and severally liable for the liabilities of the close corporation at the time of its deregistration.

[20] Section 26(5) of the Act was amended by s6 of the Close Corporations Amendment Act¹¹ by deleting the phrase *‘and all other former members’*. After this amendment, the relevant section reads as follows:

¹¹ Act 69 of 1986

“If a corporation is deregistered while having outstanding liabilities, the persons who are members of such corporation at the time of deregistration shall be jointly and severally liable for such liabilities.”

- [21] Section 26 of the Act was finally substituted by s224(2) of Act 71 of 2008 and currently reads as follows.

“26 Deregistration

Sections 81 (1) (f), 81 (3), 82 (3) to (4), and 83 of the Companies Act, each read with the changes required by the context, apply with respect to the deregistration of a corporation, but a reference in any of those provisions to a company must be regarded as a reference to a corporation for the purposes of this Act.”

- [22] The relevant sections of the Companies Act¹²

“83 Effect of removal of company from register

- (2) *The removal of a company's name from the companies' register does not affect the liability of any former director or shareholder of the company or any other person in respect of any act or omission that took place before the company was removed from the register.*
- (3) *Any liability contemplated in subsection (2) continues and may be enforced as if the company had not been removed from the register.”*

- [23] Mrs. Stanton submitted that the amendments to s26(5) do not have any effect with regard to the liability of the members *in casu*. I agree. A proper interpretation of the existing s26 read with the provisions of s83 of the

¹² Act 71 of 2008

Companies Act, is that the removal of a close corporation's name from the register does not affect the liability of any former member of the close corporation or any other person in respect of any act or omission that took place before the close corporation was removed from the register. It follows further that, any liability contemplated in s83(2) of the Companies Act continues and may be enforced as if the close corporation had not been removed from the register.

- [24] In my view the plaintiff's Particulars of Claim does not lack averments which are necessary to sustain an action against the defendants. The exception should therefore not have been upheld and the order of the Magistrate is to be set aside.

WHEREFORE I MAKE THE FOLLOWING ORDER:

- 1. THE APPEAL IS UPHELD;**
- 2. THE ORDER OF THE MAGISTRATE IS SET ASIDE AND REPLACED WITH THE FOLLOWING:**

“THE EXCEPTION IS DISMISSED WITH COSTS.”

S L ERASMUS, AJ
ACTING JUDGE

I agree.

BM PAKATI, J
JUDGE

<u>On behalf of Appellant:</u>	Adv. A. Stanton (oio Duncan & Rothman Inc)
<u>On behalf of Respondents:</u>	No appearance