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IN THE NORTH GAUTENG HIGH COURT – PRETORIA
(REPUBLIC OF SOUTH AFRICA)

15/07/2013
CASE NO: 48248/2010

In the matter between:

BARLOWORLD LOGISTICS AFRICA
(PTY) LTD

APPLICANT

and

SILVERTRON 481 CC

1ST RESPONDENT

GEORGE MCDONALD

2ND RESPONDENT

WILLEM HENDRIK VILJOEN ERASMUS

3RD RESPONDENT

JUDGMENT

N V KHUMALO AJ

INTRODUCTION

- [1] Applicant is suing Silvetron 481 CC, a duly incorporated close corporation ("1st Respondent") and or the 2nd and 3rd Respondents for payment of a sum of R399 133.85 plus interest payable thereon for shipment and ancillary services that Applicant alleges to have rendered to 1st Respondent, at its special instance and request during the period June 2007 to May 2008.

- [2] The 2nd Respondent George McDonald and 3rd Respondent, Willem Hendrik Erasmus, are being sued in their personal capacities in terms of Section 23 of the Close Corporation Act 69 of 1984 (“The Act”) allegedly as members of the 1st Respondent.
- [3] The three Respondents filed a notice to oppose the Application but the 1st and 2nd Respondents have since withdrawn their opposition and only 3rd Respondent proceeded to file opposing papers.
- [4] Although the issues between the parties, *prima facie* seemed simple and easily discernible and the amount claimed inconsiderable, the documents filed of record extended into 464 pages, with the heads of argument the Application consisted of a formidable bundle of more than 500 pages. Contributing to the paper trail was a set of lengthy affidavits filed by the Applicant in Reply and 3rd Respondent answering to Applicant’s Reply both raising additional facts and contentions.

BACKGROUND FACTS

- [5] A company called ZA Trans Logistics (Pty) Ltd, (“ZATRANS”) signed a credit facility agreement that incorporated an Application submitted by 2nd Respondent, granting an entity stated in the agreement as Willie Erasmus and Medewerkers Trust trading as Silvertron 481 CC (“WEM Trust”) a credit facility in terms of which ZATRANS was to provide custom clearing, export and delivery of shipments services to 1st Respondent on credit, subsequent to declining an Application submitted in the name of the 1st Respondent.
- [6] Accordingly, commencing from June 2007 to July 2008 ZATRANS rendered services in terms of the credit facility to the 1st Respondent, issuing monthly statements of account (“invoices”) to WEM Trust for such services. Payments on the invoices were made by 1st Respondent as well as 3rd Respondent, a trustee of Willie Erasmus and Medewerkers Trust (“the trust”). As at 28 April 2008, an amount of R524 165.00 allegedly remained outstanding.

- [7] In a meeting held on 20 May 2008 by ZATRANS, 1st Respondent and WEM Trust represented by 2nd Respondent, the parties agreed that the outstanding amount be reduced by an amount of R17 884.80. 2nd Respondent then informed ZATRANS that the indebtedness was that of 1st Respondent not WEM Trust even though the credit facilities were granted to WEM Trust. Consequently Applicant attached and sold goods that were to be shipped on behalf of 1st Respondent that it held as a lien and credited the proceeds of R107 146.43 to the debt. The amount owing was allegedly reduced to R399 133.85 and subsequent a written request by 2nd Respondent, ZATRANS amended the invoices to the name of the 1st Respondent. The original invoices that were already issued were then credited to WEM Trust and reissued, debiting 1st Respondent with the amounts.

APPLICATION

- [8] Applicant, that is Barloworld Logistics, is suing for the payment of the outstanding amount citing itself as ‘formerly known as ZA Trans Logistics (Pty) Ltd’, and as having granted the credit facilities and agreed to do business with **WEM Trust** after conducting the necessary credit checks and opening an account in its books in the name of WEM Trust due to 1st Respondent not qualifying for such credit facilities.
- [9] In its founding affidavit deposed to by its financial manager, Wendy Jean Boschetti (“Boschetti”), Applicant alleges that;
- [9.1] Following the agreement, it received written instructions (orders) signed and issued by 2nd Respondent to render the services agreed upon at the instance and request of 1st Respondent, without 1st Respondent’s registered full name and company registration number being reflected on the purchase orders as required in terms of Section 23 (1) (b) read with Section 23 (2) of the Act as amended. 3rd Respondent authorised the orders for the 1st Respondent, alternatively the issuing thereof, and expressly or tacitly by conduct authorised the 1st Respondent to order the services from Applicant as alleged. As a result the 2nd and 3rd Respondent are liable for the outstanding amount.

[9.2] There were no objections when the invoices were issued to WEM Trust for the services that were rendered to 1st Respondent until when 2nd Respondent directed that the invoices be reissued in the name of 1st Respondent.

[10] In response, 3rd Respondent, raising the following points *in limine*, moved for the Application to fail:

[10.1] that Applicant has not demonstrated the necessary *locus standi* to bring this application due to the absence of a resolution taken by the Applicant to institute motion proceedings against the 2nd or 3rd Respondents and authorising, Boschetti, to do so.

[10.2] Applicant, duly incorporated in 1905, alleges to have been formerly known as ZATRANS, a separate legal entity with its own registration number, different and incorporated in 1996, without attaching any official documents that reflect the name change from ZATRANS to the alleged current name of Barloworld Logistics Africa, therefore failing to make appropriate allegations in its founding affidavit to establish its *locus standi* to sue the Respondent.

[10.3] a misjoinder of both the Second and Third Respondent and non-joinder of the trusts allegedly based on incorrect assertion by the Applicant that 2nd and 3rd Respondent are members of the 1st Respondent. On the CIPRO documents attached to Applicant's founding affidavit, 2nd and 3rd Respondents member's type is indicated as "trust" and therefore they were not members of the 1st Respondent in their personal capacities but as representatives of the trusts, the Willie Erasmus and Medewerkers Trust and Angel Investment Trust, respectively, the actual members of the 1st Respondent. He alleges that the trusts should be before court and not the 2 Respondent and himself,

[11] Furthermore, 3rd Respondent challenges the Application on the ground that the resolution taken by the Applicant's board prior to the institution of these proceedings confirms that there is a dispute with regard to the invoicing of the amount of R399 133.85 that was not resolved and that Counsel advised the directors to proceed by way of summons, but Applicant proceeded with an Application even though a glaring

factual dispute could be foreseen and failed to make out a case on its papers and that Applicant has also not complied with the National Credit Act 34 of 2005 making the application fatally defective, therefore it should be dismissed with costs.

[12] Applicant filed a Replying Affidavit admitting that the resolution that was attached to its Founding Affidavit was defective and attached another resolution ratifying the authority of Boschetti to institute the launched motion proceedings against the Respondents.

[13] As proof of its *locus standi* to sue on the debt, it attached the latest copy of an outsourcing service agreement dated 10 October 2007 it allegedly concluded with ZATRANS that was effective from 1 October 2006 and renewable from time to time, as well as a sale of business agreement of its purchase on 10 April 2007 of the business of ZATRANS as a going concern that was effective from 1 October 2006. It alleges that after the sale and conclusion of the aforementioned agreements ZATRANS became its division and the Respondents were at all material times aware of that fact. So after the sale the business was concluded by Applicant through its ZATRANS division and services therefore rendered to 1st Respondent by Applicant as ZATRANS, and so the creditor to which the 1st Respondent is indebted was at all material times the Applicant. The new stationery was then not available hence it used the old stationery.

[14] In response to the allegation of misjoinder and non-joinder Applicant reiterated its assertion that 2nd and 3rd Respondents were members of the 1st Respondent in their personal capacities and attached a copy of the enquiry it conducted with Kreditinform in support of its allegation, pointing out that a trust as a member of a CC would be in contravention of the provisions of s 29 of the Act,.

[15] As proof that it was not guilty of reckless lending Applicant attached an Application by WEM Trust for an increase on the credit facility during the period of the agreement and the approval by credit guarantee to increase the cover on such a facility. It also confirmed that there were disputes of facts and implored for the matter to be referred to trial for *viva voce* evidence.

- [16] 3rd Respondent, with Applicant's consent filed an Answering Affidavit to the Applicant's replying affidavit, reiterating mostly the assertions in his initial affidavit, however also rejecting that Applicant can, in a replying affidavit remedy its failure to establish in the founding affidavit the authority of Boschetti's to institute the motion proceedings and Applicant's legal standing to sue the Respondents.
- [17] He also rejected Applicant's claim that one company can be a division of another company and its status be assumed by the latter and that Applicant rendered any services to 1st Respondent.
- [18] The standpoint on the trust EWMT being the member of the 1st Respondent and not the 2nd and 3rd Respondent was likewise reiterated and now alleging that the services were rendered not to the 1st Respondent but the trust.
- [19] Even though I was implored to consider the referral of the matter to trial due to the dispute of facts alleged to exist. I am of the view that there are several material issues that are capable of resolution from the undisputed facts and the substantiating documentary evidence that forms part of the record, the contents of which was undisputed except for the context and interpretation imputed to the contents therein, without having to resort to oral evidence as well as pertinent issues raised *in limine*, that required to be resolved..

AUTHORITY TO SUE

- [20] The resolution annexed to Applicant's Replying affidavit taken by its board of directors subsequent to its launching of the motion proceedings read as follows:

RESOLVED

- "1. That all steps taken by the company in the Gauteng North High Court under case number 48248/2010 in order to recover payment of the total amount owed by Silverton 481 CC ("Silverton"), George McDonald and Willem Hendrik Viljoen Erasmus, be and are hereby ratified.
2. That the company hereby confirms its resolution to institute the aforesaid proceedings and ratifies the institution of the aforesaid proceedings.

3. Wendy Boschetti, in her capacity as financial Manager: Freight Forwarding, be and is hereby authorised to continue representing the Company in such proceedings and to sign all documents and to take all steps and do all things necessary to give effect to the above resolutions”

[21] Applicants Counsel argued that the intention of the resolution was to ratify the launching of the Application by Boschetti even though she alleged to have been duly authorised when she deposed to the founding affidavit. Counsel referred to the matter of *Smith v Kwanonqubela Town Council* 1999 (4) SA 947 (SCA). Watson, the deponent to the founding affidavit in that matter, was not authorised at the time of instituting the legal proceedings and he only acquired the status that authorised him to do so thereafter. When his lack of authority and the retrospective ratification thereof was challenged, the court held that:

“a party to litigation did not have the right to prevent the other party from rectifying a procedural defect. Were it otherwise, one party would for instance not be entitled to amend a pleading, especially not after the filing of an exception.”

[22] In *Merlin Gerin (Pty) Ltd v All Current and Drief Centre (Pty) Ltd* 1994 (1) SA 659 (C) 13, The Respondents objected to the lack of authority of the Applicant’s director who at the time of signing the founding affidavit had no authority to do so. The Applicant’s board of directors subsequently ratified the director’s actions. Explaining the situation, Conradie J on page 660 FG stated that:

“For the enforcement of this right, the respondent has only one remedy, to move for dismissal of the application. Moving for dismissal is not itself a right, but a remedy for the right not to be unfairly proceeded against. And applicant now has two options. If he had no authority to begin with he would attempt to defeat the remedy (dismissal of his application) by obtaining authority by way of ratification and by putting proof of that before the court. Or he might put better proof of pre-existing authority before the court. Once the applicant has done this, he will be bound by an order for costs against him. In this way, ratification would not harm but benefit the respondent, and so would be unequivocal proof of pre-existing authority.”

Accordingly, the court held that ratification saved the application.

- [23] It is therefore safe to say that the law is settled on the point that a person instituting motion proceedings on behalf of a company or voluntary association or municipalities or an artificial person must establish his authority to do so in his founding affidavit failing which the defect can be ratified with retrospective effect if the deponent to the founding affidavit was indeed acting on its behalf and not on his own romp.
- [24] Again, in *Smith*, Rabie CJ recognised that it is essential for a valid ratification that there must have been an intention on the part of the principal to confirm and adopt the unauthorised acts of the agent done on his behalf, and that that intention must be expressed either with full knowledge of all the material circumstances, or with the object of confirming the agent's action in all events, whatever the circumstances may be. Applicant's resolution authorises Boschetti to continue acting on behalf of the Applicant and even though not that specific, it also ratifies the steps that she has already taken. The intention of the directors to ratify even those steps is apparent from the resolution's ratification of all the steps that the company has previously taken in the matter.

LOCUS STANDI IN JUDICIO OF APPLICANT

- [25] The 3rd Respondent's contention on the *locus standi* is twofold. Firstly he argues that Applicant's failure to sufficiently plead its standing in the founding affidavit is fatal to the Application as it cannot be rectified in its Replying affidavit and if it is found that it can, the Applicant remains non-suited to launch the present proceedings on the basis that the credit facility agreement was concluded with ZATRANS. He further disputes that ZATRANS underwent a name change or was sold to Applicant or is a division of the Applicant.
- [26] Whether a litigant's interest is sufficient to clothe him or her with the required standing is to be determined in the light of factual and legal context made-The facts necessary to establish the standing should appear from the record before the court and must be sufficient in their factual and legal context. See *Rienaldo Investments v Giants Concerts CC* 2012 (3) All SA 57 SCA.

[27] It is an established general rule that a person who claims relief from a court must establish an interest in that matter in order to acquire the necessary *locus standi* to seek relief. It must be made apparent to the court that he is entitled to the relief sought. Rabie ACJ in *Cabinet of the Transitional Government for the Territory of South West Africa v Eins* 1988 (3) SA 369 (A) at 388A-I stated that:

“The interest must be direct and not therefore not too remote or as it has also been referred to, an actual and existing interest in the matter.”

[28] It is therefore for the party instituting proceedings to allege and prove that he has *locus standi*, so the onus rests upon the applicant and that is considered ‘an onus in the true sense; the overall onus...’ (*Mars Incorporated v Candy World (Pty) Ltd* 1991 (1) SA 567 (A) AT 575H-I).’ in a minority concurring judgment of Harms JA in *Gross & Others v Penz* 1996 (4) SA 617 (A).

[29] It is trite law as well that such appropriate allegations to establish *locus standi* or the interest should be made in the launching affidavits, that is the founding affidavit and not in the replying affidavit, as the Applicant makes his or her case in the founding affidavit. See *Scott v Hanekom* 1980 (3) SA 1182 (C) at 1188 H and *Giant Concerts CC V Minister of Local Government, Housing and Traditional Affairs, Kwazulu Natal* 2011 (4) SA 164 (KZP) at 170H-I. Failure to do so is no mere technical defect because the *locus standi in judicio* of the applicant is fundamental to the applicant’s rights to claim the orders sought in the founding affidavit in the absence of which the court should not entertain the application. See *Spoornet v Watson* 1994 (1) SA 513 (W). See also Commentary in Erasmus – Superior Court Practice pages B1-123 to B1-126 HH and *Rich v Lagerway* 1973 (1) SA 485 (W) at 487 B-D. The purpose is to make sure that all the allegations that Applicant relies upon for the relief sought are completely divulged for his opponent to recognize the case he or she is to meet and be able to respond fully and adequately.

[30] The late disclosure of material facts upon which the case is made out is discouraged in *Transnamib Ltd v Imcor Zinc (Pty) Ltd (Moly Copper- Mining and Exploration Corporation (SWA) Ltd and Another Intervening* 1994 NR 11 (HC)). It was

confirmed that an applicant must make out his case in his founding papers and that such papers are a combination of pleadings and evidence and pointed out that an applicant cannot merely set out a skeleton case in the founding papers and then fortify this in reply. If scant material is furnished in the founding papers the applicant runs the risk of his application being dismissed and should not complain if this is done as it was up to him to put more facts to the Court if he could. The Court may in its discretion allow deviations from the normal procedures but it must be borne in mind that the normal procedures developed as they did because they would almost invariably be consonant with the best interests of the administration of justice.

- [31] The omission in the founding affidavit of essential averments that Applicant relies upon to establish his entitlement to the relief sought may therefore be fatal to the Application and it would be considered unfair and underhanded to establish the entitlement anywhere else other than in the founding affidavit, unless if the assertions are found to be legitimate responses to Respondents allegations and not included solely to remedy an omission in the launching of affidavits. D E van Loggerenberg and P B J Farlam on “Erasmus Superior Court Practice (2009) B1-B45 to B1-B46 with reference to a few authorities therein instructs that:

“all necessary allegations upon which an Applicant’s case is based must appear in his or founding affidavit, a court will not usually allow an Applicant to make out a completely different claim in his or her replying affidavit. A court does have a discretion to allow new matter in a replying affidavit and a distinction is usually drawn between a case in which new material is first brought into light by the Applicant who knew of it at the time when his or her founding affidavit was prepared and a case in which facts alleged in a Respondent’s answering affidavit revealed the existence or possible existence of a further ground for relief. In the latter case, a court would more readily incline to allow new matter, in a replying affidavit but then would allow a fourth set of affidavit.”

- [32] In Applicant’s founding affidavit, the allegation it relied upon for its *locus standi* was that it was previously known as ZATRANS the company that rendered services for which the outstanding amount is owing, albeit attaching documentation in proof

thereof, and when Respondent in its answering affidavit challenged the insufficiency of that statement, without forsaking the previous assertion Applicant then responded by making new assertions in its replying affidavit regarding the purchasing of ZATRANS business and the cession incorporated in the sale agreement with retrospective effect operative during the granting of the credit facility and that ZATRANS was a division of the Applicant so the services that were rendered to 1st Respondent was by Applicant and not ZATRANS.

[33] Applicant allegations in the founding affidavit on the *locus standi* were insufficient, and the averments in the replying affidavit constitute new grounds that Applicant relies upon for claiming the relief sought, than amplify the insufficient averments in the founding affidavit. In exercising its discretion the court should recognize that the establishment of *locus standi* for the relief sought is to be made in the launching affidavit and that in a situation where it is insufficiently pleaded, and an elaboration is done on the replying affidavit it would not be fatal if the other party had an opportunity to respond and address the new facts. Under normal circumstances this conduct would have been offensive to one's sense of justice

[34] 3rd Respondent sought and got consent from the Applicant to file further affidavits in response to the new material in the replying affidavit, which further affidavits the court had no difficulty allowing, taking heed of Wepener J's affirmation in *Pangbourne Properties v Pulse Moving* 2013 (3) SA 140 that: 'Affidavits can validly be before the court pursuant to an agreement between the parties-see Rule 27 (1) which provides for such an agreement. They can also be validly before the court if the interest of justice require it.' Further disclosure by Applicant of new grounds were in response to 3rd Respondent's challenge, considering that they consists of facts that Applicant knew but overlooked when it prepared its founding affidavit, opting to declare unsubstantiated facts makes the situation different, not exactly as proposed and explained in van Loggenberg. What should therefore be determined under these circumstances is whether any prejudice will be suffered by the 3rd Respondent in the conduct of his defence as remarked by Leveson AJ (as he then was) in *Brenner's*

Service Station and Garage (Pty) Ltd v Milne and Another 1983 (4) SA 233 (W) at 237G-H as follows:

“I think it emerges from the passage quoted that, in appropriate cases, the court is entitled to refuse to take heed of a technical irregularity in a procedure which does not cause prejudice to the opposite party.”

And also previously echoed by G Schreiner J in *Trans-African Insurance Co Ltd v Maluleka* 1956 (2) SA 273 (A) at 278F-G stating that:

“(T)echnical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits.’

[35] Since the 3rd Respondent was afforded an opportunity to deal with the *locus standi* as pleaded in the Replying affidavit by being allowed to file further affidavits (that being of significant importance) circumventing any prejudice or injustice that 3rd Respondent could have suffered and as no prejudice or injustice was alleged to have been suffered by the Respondent as a result of this irregular way of dealing with the matter even though this was serious remissness on the part of the Applicant, the Application was not rendered fatal.

[36] A further contention on the *locus standi in judicio* of the Applicant was that even if it is found that the Application is not fatal the Applicant is non-suited to bring this Application, as ZATRANS was the company that granted the facility and rendered services to 1st Respondent. The sale of ZATRANS to Applicant did not make them one company or make ZATRANS, a division of the Applicant. This challenge was not addressed in Applicant’s heads of argument, but during the hearing its Counsel argued that it was disclosed and apparent that ZATRANS is a division of Applicant and referred to an annexure that was part of the credit facility agreement, ZATRANS’s invoices and forms completed on behalf of 1st Respondent to issue instructions or orders that bared Applicant’s name on the letterhead indicating that ZATRANS is its division. She argued that at the time of the transaction, ZATRANS was already a part of Applicant. Applicant also attached invoices issued in its name which were not challenged by any of the Respondents. Respondent’s Counsel’s did not offer much elaboration or authorities on its heads or argument to substantiate its allegations except for

repeating the statements in its papers and that ZATRANS as a separate legal persona cannot be a division of another legal persona.

[37] A division in company terms denotes a portion of a business entity (see 'Longman Business English Dictionary') that operates under a different name. It is still a part of the entity itself even though it operates under a separate name, at the same place or at a different place, generally the equivalent of a corporation or limited liability company obtaining a fictitious name or "doing business as" certificate and operating a business under that fictitious name. The parent company is legally responsible for all of the obligations and debts of the division. So although a division operates separately it does not run itself separately and is owned by the primary business. As generally accepted, the division would be unregistered and have a fictitious name, so incapable of suing or being sued in their own names as they lack a legal *persona* and accordingly lack capacity to contract or to sue. Leveson J in *Two Sixty Four Investments (Pty) Ltd v Trust Bank* 1993 (3) SA 384 (W); made a subtle distinction between those with fictitious names and those whose names are followed by the acronyms Pty and Ltd and incorporated, postulating that:

'Under our law no juristic person is capable of being divided into a number of separate juristic personalities, all forming a division of the whole. The concept is totally alien to our jurisprudence. Thus when reference is made to a business which is conducted under a trading name and the words "Limited" or "(Proprietary) Limited" are not affixed thereto, no ground exists for drawing the inference that the business as an entity enjoys corporate personality. If in addition thereto it is said that the business is a division of a named company, registered according to the laws of the Republic, there is only one possible further inference and that is that the incorporated company trades through the medium of the business under that particular trading name.

[38] Leveson's statement recognizes that an incorporated company can operate through the medium of another entity that enjoys a separate corporate personality or one with a fictitious existence. The distinction between the two being that the latter lacks the capacity to sue. Griesel J in *Ford v Alphera Financial Services (A Division of BMW Financial Services)*

South Africa (Pty) Ltd (20932/10) [2012] ZAWCHC 185 (20 November 2012) deviated from the standard rule that ‘a fictitious entity’, as indicated by Leveson lacks a separate legal personality and finding support in Rule 14 (2) of the Uniform Rules of Court, that provides that a partnership, firm or association can sue or be sued in its own name and with reference to (ed) *The Law of South Africa* vol 3 para 55 where Joubert says of these Rules that they "are designed to solidify and facilitate actions and applications by or against partnerships, firms and associations which at common law cannot generally sue or be sued in their own names apart from the members constituting it." held that:

“In my opinion, while the word "division" may not be the most appropriate ("firm" or "business" would have been better), it is perfectly clear that the respondent is a business concern owned by the company Bankorp Bpk”.

[39] So although ZATRANS due to the fact that it is registered, enjoys a separate corporate persona, can sue and be sued on its own, it can still be a division of another incorporated company. It is owned and it transacted as a division of the Applicant (the parent company), the inference to be drawn, according to Leveson is that the Applicant traded through the medium of the business of ZATRANS as its trading company. So the Applicant has a direct and substantial interest in the proceedings which interest the Respondents were aware of when the transactions took place. The corporate personality of ZAT does not take away Applicant’s right as the parent company that owns and controls its operations and carry the responsibility of all its debts and obligations. I therefore find that the Applicant has sufficiently established its entitlement to sue. The law only requires that the controlling party should be honest in their operations of such entities and not contravene s 20 (9) of the Companies Act 2008.

[40] Besides the documents referred to by the Applicant, the Application for a credit facility show the letterhead of ZATRANS and a sheet with supplementary information in respect of the National Credit Act annexed thereto that exhibits the name ZATRANS “a division of Barloworld Logistics” the details of the Applicant. So the documents completed by the parties to the agreement did reflect that ZATRANS, the contracting party is a division of Applicant.

[41] Respondent then questions the inter acquisitions of business between the Applicant and ZATRANS after the sale as proving their separate existence and personality. The setting up of a separate legal entity in the case of a corporation or a limited liability company, in

order to separate the actions of the entity from those of the other company, incorporating each as a division in the group with a separate legal personality is not prohibited. As well as their inter-transactions on condition they are not with the intention to defraud and there is no abuse of the juristic personality of the two companies in relation to the formation or use of any of the companies.

[42] 3rd Respondent's further contention was that WEMT and Angel Investment Trust are members of the 1st Respondent and so have an interest in these proceedings and were supposed to have been joined and that the joining of 2nd and 3rd Respondents as parties was a misjoinder as their names appear in the CIPRO document in their representative capacities as trustees of the 2 trusts. In support of this contention the 3rd Respondent has referred to the CIPRO document that reflects the name of 3rd Respondent and type of his membership as trust. Applicant, to challenge that information, in turn attached a document by Kreditinform generated for credit profiling, with the names of 2nd and 3rd Respondents as members. She argued that a trust cannot be a member of a close corporation as that is in breach of s 29 of the Close Corporation Amendment Act 25 of 2005 ("the amendment") and reiterated that the issue cannot be resolved without viva voce evidence. 3rd Respondent's Counsel countered that response by pointing out that the same document reflects that WEM Trust holds 100% shareholding (probably referring to the member's interest).

[43] I do not believe as I have indicated already that the documentary evidence and consideration of probabilities will be disturbed by the viva voce evidence. The question that needs to be answered has a bearing to the alleged s 23 breach, a question of law, (Was there a breach of s 23 and if so, who are the correct members that are to be held liable for the debt and thus to be joined in the proceedings?) which in turn will address the question of a misjoinder and non-joinder..

[44] The 1st Respondent as a Close Corporation ("CC") has got its own legal personality, separate from its members and can sue and be sued in its own name. Therefore members cannot be cited or joined as members of a CC when litigating for, or against

a CC unless there has been proof of members' abuse of the juristic personality of close corporation or using corporation as an instrument to promote own interests contrary to s 65 of the Act 69 of 1984; See *TJ Jonck BK h/a Bothaville Vleis mark v Du Plessis NO* 1998 (1) SA 971 (O) or where the close corporation conducted business under a name other than its registered name without giving any indication of its real name or of the fact that it was a close corporation. Such conduct was found to be in contravention of s 23 (provisions relating to the use and publication of names) and sec 63(a) (failure to use abbreviations 'BK' or 'CC') and sufficiently serious enough to constitute a contravention of s 65 (abuse of separate juristic personality of corporation) of the Act. See *Haygro Catering BK v Van der Merwe* 1996 (4) SA 1063 (C). In these instances the corporate veil is lifted and the close corporation members can on Application be declared personally liable for debts of the close corporation or jointly and severally liable together with the close corporation for its debts. This is an avenue that is available to the Applicant or Plaintiff who is aggrieved due to the conduct mentioned.

[45] Applicant's allegation is that in the purchase and/or written orders that were issued on behalf of the 1st Respondent by 2nd Respondent, with the authority of 3rd Respondent, the registration numbers of 1st Respondent and its full names that indicate that it was a CC was never detailed in the orders/documents in breach of s 23 of the Act as a result 2nd and 3rd Respondent, as members of the 1st Respondent who authorized and issued the orders were personally liable. Applicant therefore applied that they be declared jointly and severally liable together with the close corporation for its debt. It subsequently amended its notice of motion without opposition from the Respondents, claiming payment from either each of the Respondents individually and or together.

[46] The 3rd Respondent is denying that s 23 has been breached and that 2nd and 3rd Respondents are members of the 1st Respondent with reference to the Kredinform document that indicates that Willie Erasmus and Medewerkers Trust has 100% member's interest. However the latest CIPRO documents attached to his answering affidavit dated 03 November 2010 confirm that Erasmus namens Willie Erasmus and Medewerkers Trust IT5379/94 as the only member holding 100% shares. The trustee

member, Goerge Macdonald namens Angel investments Trust resigned with effect from 14 April 2007 and 2nd and 3rd Respondent remain as 0% shareholders. S 29(1) A of the Close Corporations Amendment Act 25 of 2005 provides that ‘a natural or juristic person in the capacity of a trustee of an inter vivos trust may be a member of a corporation’ provided certain conditions are met. Hence the trustee becomes a member and not the trust as it is not a ‘juristic person’. In the absence of a specific statutory provision that makes a trust a person for that specific purposes, it is the name of the trustee that is disclosed in relation to trust matters. It is to be clearly indicated next to that person’s name the capacity of such person that he is acting as a trustee (i.e. not as a principal or beneficial owner and details of the testamentary trust must be given). It is therefore valid to assume that the same details regarding an inter vivos trust must be disclosed. So the proper disclosure would be as follows: “*Cilliers, as trustee of the XYX Trust: reference number____, Master’s Office Pretoria*)” The amendment did not suddenly enable ‘a trust’ to be a member of a corporation.

[47] The 3rd Respondent’s allegation that the trust was a member of 1st Respondent is therefore incorrect and if true, it would be in breach of Section 29. The true state of affairs with regard to the membership of the 1st Respondent is only what is reflected in its CIPRO documents and certainly not in the Kreditinform document which information is also depended on the data from CIPRO. As indicated the latest information reflect the 3rd Respondent to be a member as trustee of EWMT with 100% shares, and as a member concerned, 3rd Respondent, as between himself and the corporation, personally have all the obligations and rights of a member. Therefore on contravention of the provisions of Section 23, he would be liable for the debts of the corporation. For that reason, 3rd Respondent’s contention on the non-joinder of the Trust, misjoinder of the 2nd and 3rd Respondents and insistence that a trust can be a member of a CC is misconceived and without merit.

[48] Applicant alleged that there was a contravention of the provisions of s 23 of the Act in that the registration number and full name of 1st Respondent were not disclosed in the purchase orders or written clearing instructions that were issued on behalf of 1st Respondent by the 2nd Respondent as authorised by 3rd Respondent. 3rd Respondent

Counsel argued that the instructions were issued by completing forms provided by the Applicant and copies of which it attached to its replying affidavit. All the forms that had full orders or instructions reflected the abbreviation CC after the name of the 1st Respondent, with several of them without the registration numbers. The copies that Applicant also attached as proof of clearing instructions by 2nd Respondent on behalf of 1st Respondent indicate the full name of 1st Respondent ending with CC.

[49] The relevant provisions of the Act provides on s 23 (2) that: If any member of, or any other person on behalf of, a corporation-

- (a) issues or authorizes the issue of any such notice or official publication of the corporation, or signs or authorizes to be signed on behalf of the corporation any such bill of exchange, promissory note, endorsement, cheque or order for money, goods or services; or
- (b) issues or authorises the issue of any such letter, delivery note, invoice, receipt or letter of credit of the corporation, [Para. (b) substituted by s. 8 (b) of Act 26 of 1997.]

without the name of the corporation, or such registered literal translation thereof, and its registration number being mentioned therein in accordance with subsection (1) (b), he shall be guilty of an offence, and shall further be liable to the holder of the bill of exchange, promissory note, cheque or order for money, goods or services for the amount thereof, unless the amount is duly paid by the corporation.

[50] The above section is duly complemented by s 63 (a) of the Act that provides for personal liability of a member of a CC for its debts for the use of the name of the CC without the abbreviation CC thereafter. In determining whether a breach of either of the sections has been committed it is important to consider the purpose for their enactment, by looking at the interpretation bestowed on the statutes. In *G & C Construction v De Beer en Ander* 2000 (2) SA 378 (T) the court concluded that the intention of the statutes was for the member to be held liable only if the other party to the agreement was unaware that it was dealing with a CC, and if that lack of knowledge was due to the CC member's conduct. The court dismissed with costs the claim brought against De Beer personally for the outstanding payment for the months

during which G & C had already become aware of the existence of the CC and that De Beer had been acting on its behalf. The intention of the statutes clearly being to protect and make sure that a party is aware of the identity and of the status of an entity it is contracting with, if it is a close corporation that is duly registered with a legal personality.

[51] The documents on which the instructions were issued are indeed Applicant's forms and not a document generated by the 1st Respondent and had the full name of the 1st Respondent. Applicant, in its founding affidavit confirmed that 2nd Respondent provided it with a Vat number and a company registration number CK2007/044211/23 which belongs to 1st Respondent, upon which it relied in making its decision to conduct business with the 1st Respondent. So apart from the orders that bore the full name of the 1st Respondent, Applicant, from the beginning was aware that 1st Respondent was a close corporation being in possession of its registration number and had made its decision fully aware of the limitations of its dealings. Applicant bore the onus to prove that there was an intention to conceal the status of the 1st Respondent for it to succeed in its claim against the members of 1st Respondent. It failed to establish any intention to conceal the real status therefore failed to prove the alleged s 23 breach and therefore is not entitled to the relief sought against the member/s of the 1st Respondent. The claim against 2nd and 3rd Respondents must fail, even though Applicant has proved its claim against the 1st Respondent, since there is evidence of services being rendered to 1st Respondent and the sum claimed has not been effectively challenged.

[52] Whereas the claim against 3rd Respondent has not been successfully proven, since the points in limine it raised have not been successful, no costs has been granted in its favour.

[53] Under the circumstances the following order is made:

[53.1] The 3rd Respondent's points *in limine* are dismissed.

[53.2] Judgment is granted against the 1st Respondent for:

[53.2.1] payment of the sum of R399 133.85 plus interest thereon at
the rate of 15.5% per annum a tempore morae

[53.2.2] Costs of suit

[53.3] Application against 2nd and 3rd Respondent is dismissed with no
order as to costs

N V KHUMALO J

ACTING JUDGE OF THE NORTHGAUTENG HIGH COURT

Counsel for Plaintiff: E F Dippenaar SC

Instructed by: Breytenbach Mostert Skosana Inc

Counsel for 3rd Respondent: Adv S G Maritz

Instructed by: Potgieter Marais