THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable

CASE NO: 658/05

In the matter between :

JOHANNES PETRUS NEL	First Appellant
ROBERT JAMES WILKE	Second Appellant
DANIËL JACOBUS LOUIS NEL	Third Appellant

and

METEQUITY LIMITED	First Respondent
INVESTEC BUSINESS SERVICES LIMITED	Second Respondent

Before: **STREICHER, CAMERON, MLAMBO JJA, MALAN & CACHALIA AJJA**

Heard: **6 NOVEMBER 2006**

Delivered: **22 NOVEMBER 2006**

Summary: Identity of interest between trustees and beneficiaries in so far as object of trust is concerned does not invalidate trust – mere fact that corporate trustees and beneficiaries have the same shareholder and directors does not justify lifting corporate veil.

Neutral citation: **This judgment may be referred to as Nel v Metequity Ltd [2006] SCA 140 (RSA)**

J U D G M E N T

STREICHER JA

<u>STREICHER JA</u>

[1] This is an appeal against a judgment in the Witwatersrand Local Division in favour of the respondents, the trustees of the Jan Nel Bond Trust, against the appellants as sureties in respect of amounts owing by NWN Eiendomme (Edms) Bpk ('NWN') to the respondents.

[2] The appellants had bound themselves as sureties for and as co-principal debtors *in solidum* with NWN for the payment by NWN 'of any amount which may at any time be or become owing by or claimable from [NWN] by [the respondents] from any cause of debt whatsoever'. It is common cause between the parties that the appellants' liabilities in terms of the suretyships extended to judgment debts owing by NWN to the respondents.

[3] On 19 June 1992, in a matter cited as *Metequity Ltd v NWN Eiendomme (Edms) Bpk* the Pretoria Magistrate's Court granted default judgment 'as claimed in the summons' for R437 060,88 together with interest at 20% from 1 December 1991 until the date of final payment. In the summons referred to in that judgment, the case is likewise cited as *Metequity Ltd v NWN Eiendomme (Edms) Bpk* but in the body of the summons and in the particulars of claim it is stated that the plaintiffs are Metequity Ltd and Metboard Properties Ltd (now Investec Business Services Ltd) in their capacities as trustees of the Jan Nel Bond Trust ie the respondents in this case.

[4] The judgment in the magistrate's court was in respect of NWN's indebtedness in terms of a loan secured by a mortgage bond registered in favour of the respondents. The property held as security in terms of the mortgage bond was subsequently sold in execution and on 21 December 1993 the action that forms the subject matter of this appeal was instituted against the respondents as sureties, for the payment of the balance of the judgment debt owing by NWN. The court a quo (Goldblatt J) dismissed the various defences raised by the appellants and granted judgment in favour of the respondents jointly and severally for:

> 'a) Payment of the sum of R437 060,88 together with intereset at the rate of 20% per annum from 1 December 1991 to date of payment less R52 000 paid on the 31st of December 1992 and R402 500,00 paid on the 3rd of February 1993.
>
> b) Costs of suit.'

With the leave of the court a quo the appellants appeal against this judgment.

[5] As in the court a quo the appellants contended before us that the Trust was not a valid trust in that there was an identity of interests between the trustees (the respondents) and the beneficiary (the first respondent). They submitted that the respondents could for that reason not succeed against them. In this regard they relied on the following statement by Cameron JA in *Land*

and Agricultural Bank of South Africa v Parker and Others 2005 (2) SA 77 (SCA) at para [19]:

> 'The core idea of the trust is the separation of ownership (or control) from enjoyment. Though a trustee can also be a beneficiary, the central notion is that the person entrusted with control exercises it on behalf of and in the interests of another. This is why a sole trustee cannot also be the sole beneficiary: Such a situation would embody an identity of interests that is inimical to the trust idea, and no trust would come into existence.'

[6] The Trust was created by the respondents in terms of a trust deed according to which the first respondent 'for the purpose of providing an interest-bearing investment secured by mortgage of immovable property' advanced and settled upon the trustees, being the respondents, R400 000 ('the contribution'). The trust deed provided, furthermore, that for so long as the second respondent was a trustee it alone would exercise and carry out the powers and duties of the trustees; that the contribution would be advanced to NWN on loan to be secured by a mortgage bond over property registered in the name of NWN; that the income of the Trust should after deduction of expenses incurred by the trustees be paid to the beneficiaries; and that the beneficiaries would be the first respondent and/or any person to whom the first respondent may cede its rights in terms of the trust deed in whole or in part.

[7] Petrus Fourie who signed the trust deed on behalf of both the first and the second respondents testified that the transaction was structured as aforesaid in order to circumvent the provisions of the Participation Bonds Act 55 of 1981. However, in the event, the first respondent remained the only beneficiary. The respondents were wholly owned subsidiaries of Metboard Ltd. They acted as nominees of Metboard Ltd and had no functions other than those in terms of the trust deed and other similar trust deeds.

[8] The court a quo held:

> '[T]here is in fact no identity of interest between the trustees and the beneficiary. There are two trustees and one beneficiary and the fact that both the trustees and the beneficiaries are wholly owned subsidiaries of the same company does not create an identity of interests. Each company is a separate legal persona and its directors have to act properly in the interests of such company. Thus it cannot be said that there is an identity of interest and in fact the trust created falls fairly and squarely in the definition of 'trust" as set out in the aforesaid Act.'

[9] The appellants submitted that the finding was not correct and referred to the fact that the object of both trustees was the same, namely to generate an income for the holding company. However, the fact that trustees and beneficiaries have identical interests in so far as the object of the trust is concerned is not the identity of interests in the same person, purporting to act in different capacities which, as was stated by Cameron JA in *Land and*

Agricultural Bank, is inimical to the trust idea. Identical interests will invariably exist in relation to the fulfilment of the trust objects. The beneficiaries' interest in the trust is that effect be given to the trust deed and it is the obligation of the trustees to do so. As Goldblatt J stated, the separate personalities of the corporate trustees, even where one is also a beneficiary, preclude an inimical identity from arising.

[10] The respondents also referred to the fact that the respondents were subsidiaries of the same holding company, had the same directors, made use of the same credit committee and appointed the same nominee to act on their behalf. They submitted in effect that the corporate veil should be lifted and that the respondents should be treated as one.

[11] A company has a legal personality separate from that of its shareholders. That separate personality may, however, in certain circumstances be disregarded by a court. The mere fact that a company has only one shareholder who is in full control of the company does however not constitute a basis for disregarding its separate legal personality. The mere fact that two companies have the same shareholder and the same directors similarly does not constitute a basis for disregarding the separate legal personalities of the two companies. In this regard Corbett CJ said in *The*

Shipping Corporation of India Ltd v Evdomon Corporation and Another 1994 (1) SA 550 (A) at 566C-F:

‘It seems to me that, generally, it is of cardinal importance to keep distinct the property rights of a company and those of its shareholders, even where the latter is a single entity, and that the only permissible deviation from this rule known to our law occurs in those (in practice) rare cases where the circumstances justify “piercing” or “lifting” the corporate veil. And in this regard it should not make any difference whether the shares be held by a holding company or by a Government. I do not find it necessary to consider, or attempt to define, the circumstances under which the Court will pierce the corporate veil. Suffice it to say that they would generally have to include an element of fraud or other improper conduct in the establishment or use of the company or the conduct of its affairs.’

[12] The appellants could not point to any improper conduct in the establishment or use of the corporate respondents or in the conduct of their affairs. In the light of the fact that the corporate object of the two trustees is the same, the fact that they appointed the same nominee to carry out the Trust and made use of the services of the same credit committee, is of no significance.

[13] As in the court a quo the appellants advanced many other arguments as to why the respondents were not entitled to succeed against them. One of the arguments was that the judgment granted by the Pretoria Magistrate’s Court was a judgment in favour of Metequity Ltd and not in favour of the

respondents. The court a quo was of the view that there was no substance in the argument and said:

> 'In my opinion there is no substance to this argument which confused form with substance. There can be no doubt that the plaintiff in case number 5407/92 in the Magistrate's Court, Pretoria was the two trustees of the Jan Nel Bond Trust as described in the annexure to the summons and that the reference to Metequity Limited on the face of the summons was merely a label or shorthand description of the plaintiff and not a full and proper description of the plaintiff which was to be found in the annexure to the summons. The same label was used in the application for default judgment but only the properly described plaintiff could apply for judgment and be entitled to such judgment. Accordingly when the magistrate granted default judgment he could only have granted judgment in favour of the plaintiff as described in the annexure to the summons.'

[14] I agree. In the judgment granted it was stated specifically that it was granted 'as claimed in the summons'. In the summons judgment was claimed by the respondents and not by Metequity Ltd.

[15] But, submitted the appellants, the judgment was in any event void in that the document relied upon by the respondents as the summons, had not been issued when it was served and in that the address at which it was served as being the chosen *domicilium citandi et executandi* of NWN was no longer its *domicilium citandi et executandi*. In this regard the appellants relied on a copy of the sheriff's return and a letter in terms of which NWN advised the respondents that it had changed its address. As stated above the appellants

claimed payment in terms of a mortgage bond. According to that mortgage bond NWN chose as its *domicilium citandi et executandi* the property mortgaged, which is the address at which the summons was served. No provision was made for the changing of that address but in any event the notification that NWN had changed its address did not purport to be a notification of a change of its *domicilium citandi et executandi*. In regard to the submission that the summons was served before it had been issued the appellants contended that according to a stamp on the summons it was issued on 27 January 1992 whereas according to the sheriff's return it was served on 10 January 1992. However, the copy of the return on which the appellants rely is so poor that one can only speculate as to what the date of service was. It could be 10, 20 or 30 January 1992. In the light of the fact that the return bears the case number which, in the normal course, would be affixed to the summons when it is issued, the last date is probably the correct one. In the circumstances it is not necessary to consider what the position would have been had the summons not been served properly and had it been served before its issue.

[16] The appellants also submitted that the action in the court a quo had not been authorised by the respondents. Sections 6(1) and (4) of the Trust Property Control Act 57 of 1988 provide as follows:

‘6(1) Any person whose appointment as trustee in terms of a trust instrument, section 7 or a court order comes into force after the commencement of this Act, shall act in that capacity only if authorized in writing by the Master.’

‘6(4) If any authorization is given in terms of this section to a trustee which is a corporation, such authorization shall, subject to the provisions of the trust instrument, be given in the name of a nominee of the corporation for whose actions as trustee the corporation is legally liable, and any substitution for such nominee of some other person shall be endorsed on the said authorization.’

[17] It is common cause that Peter Quinton in his capacity as nominee of the respondents was on 18 July 1990 authorized by the Master to act as trustee of the Jan Nel Bond Trust. Quinton retired on 31 March 1992, some 21 months before the action in the court a quo was instituted and died on 12 October 1998. On 31 May 1999 the Master authorized Petrus Fourie as nominee to act as trustee of the Trust.

[18] Fourie testified that before the institution of the action in the Pretoria Magistrate’s Court he had been instructed by Quinton who was his boss to collect the money owing in terms of the mortgage bond, to hand the matter over to attorneys and to take all necessary action to collect the money. According to him this meant that he also had to give instructions that the sureties be sued if necessary. The appellants did not adduce any evidence to

gainsay Fourie's evidence but nevertheless submitted that it should not be accepted. In my view there is no reason not to accept the evidence. It follows that the institution of the action in the court below on behalf of the respondents was properly authorised.

[19] Before us the parties were agreed that in the event of it being held that the respondents should have succeeded against the appellants in the court a quo judgment should have been granted for payment by the appellants jointly and severally of an amount of R36 253,62 plus interest at the rate of 20% per annum from 31 December 1994 to 30 June 1995 and at the rate of 19% per annum from 1 July 1995. The appellants conceded that they could have had this error in the court order corrected in terms of rule 42 of the Uniform Rules. In the premises the correction of the court order does not entitle the appellants to a costs order in their favour in this appeal. The respondents asked that they be awarded the costs of two counsel. I do not think that the case warranted the employment of two counsel.

[20] For these reasons -

(a) The following order is substituted for the order of the court a quo:

'Judgment is granted in favour of the first and second plaintiffs against the second, third and fourth defendants, jointly and severally, for :

(i) payment of an amount of R36 253,62 plus interest at the rate of 20% per annum from 31 December 1994 to 30 June 1995 and at the rate of 19% per annum from 1 July 1995.

(ii) Costs of suit.'

(b) Save as aforesaid the appeal is dismissed with costs

STREICHER JA

CONCUR:

CAMERON JA)
MLAMBO JA)
MALAN AJA)
CACHALIA AJA)