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 High Court, Kimberley)

Saakno: / Case number:	**1465/2011**
Datum verhoor: / Date heard:	**14/02/2012**
Datum gelewer: / Date delivered:	**30/03/2012**

In the matter between:

HILTON BARRY BEUKMAN Applicant

and

DEWALD COETZEE First Respondent
FIRST NATIONAL BANK, PORT NOLLOTH Second Respondent

Coram: Lacock, J

JUDGMENT

LACOCK, J

[1] The applicant, the holder of the majority interest (51 %) of Bedshelf Investments Number Thirty One CC (Bedshelf), in his capacity as a member of Bedshelf, applied in this Court for the following relief:

"1. Dispensing with the forms and service provided for in the Rules of Court and allowing this matter to be heard as one of urgency in terms of Rule 6(12);

2. That a rule nisi be issued calling upon the Respondents to show cause, if any, on a date to be determined, why an order should not be granted in the following terms:

2.1 interdicting and restraining the First Respondent from operating and/or making withdrawals from the banking account no. 62065333628 of Bedshelf Investments Number Thirty One CC trading as Luhlaza ("Bedshelf Investments") held at First National Bank, Port Nolloth;

2.2 directing Second Respondent to take all necessary steps to ensure that the First Respondent is prevented from operating and/or making withdrawals from the banking account no. 62065333628 of Bedshelf Investments held at its branch;

2.3 directing the First Respondent forthwith to repay to Bedshelf Investments the amount of R227 240,86 withdrawn from its abovesaid banking account;

2.4 interdicting and restraining the First Respondent from interfering with management and affairs of Bedshelf Investments and for that purpose in any way contacting its employees or suppliers;

2.5 declaring that as consideration pursuant to the voluntary termination on 21 January 2011 of his membership of Bedshelf Investments, the First Respondent is only entitled to receive payment from the close corporation of a 49 % of the nett profit, if any, of the close corporation as at the said date of voluntary termination;

2.6 further and/or alternative relief;

2.7 directing the First Respondent, and only in the event of the Second Respondent opposing this application, the Respondents jointly and severally, to pay the costs of this application on the attorney client scale.

3. *That the provisions of sub-paragraphs 2.1, 2.2 and 2.4 above shall operate as an interim interdict with immediate effect pending the final determination of these proceedings."*

On 16 September 2011 and by agreement between the parties, Tlaletsi J made the following order:

1. *"THAT the matter is postponed to* ***Friday 14 October 2011 at 10h00****.*

2. *THAT pending finalization of the matter the following order is granted:*

   2.1 *The First Respondent is interdicted from operating and/or making withdrawals from the banking account no. 62065333628 of Bedshelf Investments Number Thirty One CC trading as Luhlaza ("Bedshelf Investments") held at First National Bank, Port Nolloth;*

   2.2 *The Applicant is interdicted from withdrawing any money from the Close Corporation account or to make any purchases on any of the Close Corporation accounts, which are not strictly related to the business of the CC;*

   2.3 *The First Respondent is interdicted from interfering with the management and affairs of the Close Corporation and for that purpose in any way contacting its employees or suppliers.*

3. *THAT costs stand over for later determination."*

The applicant now moves for the confirmation of the interim order as well as the balance of the relief claimed in the Notice of Motion.

[2] Bedshelf traded as a parks and gardens maintenance entity

at Kleinzee, having as its principal customer De Beers Consolidated Mines Ltd. Both the applicant and the first respondent as the only members of Bedshelf were for some time involved in the management and day to day business activities of Bedshelf. Both parties were employed as employees of Bedshelf, and were paid a monthly salary. Profits of Bedshelf were shared annually in proportion to the parties' membership interests.

[3] At the beginning of 2011 the first respondent relocated to Mussina in the Limpopo Province. Prior to his relocation the parties agreed that the applicant would purchase the first respondent's membership interest in Bedshelf, but were unable to agree on a price in regard thereto. Although the applicant alleges that the first respondent voluntarily terminated his membership of Bedshelf during January 2011, this averment, as conceded by Adv Potgieter SC on behalf of the applicant, is clearly untenable. It must therefore be accepted that the first respondent is still a member of Bedshelf.

[4] Since he left Kleinzee the first respondent admittedly withdrew a total amount of R227,240.86 from the bank account of Bedshelf held at the Port Nolloth branch of the second respondent over a period of approximately 8 months. Most of the money withdrawn by the first respondent

represented his monthly salary allegedly due by Bedshelf. The withdrawal of these funds spurred this application brought by the applicant against the respondents. It is further alleged that the first respondent unlawfully interfered with the work force of Bedshelf and attempted to discredit the corporation in its relationship with one of its principal suppliers.

[5] Before dealing with the merits of the application, it is necessary to consider a couple of points *in limine* taken by Adv van Niekerk SC. In the first instance, it was submitted that the applicant had no *locus standi* to bring the application under section 50 of Act 69 of 1984.

5.1 The applicant relied on the provisions of section 50(1)(b) of the Close Corporations Act, no. 69 of 1984 (the Act), reading

"*50(1) Where a member or a former member of a corporation is liable to the corporation –*

a) …

(b) on account of –

i) the breach of a duty arising from his *or her fiduciary relationship to the corporation in terms of section 42; or*

ii) negligence in terms of section 43,

Any other member of the corporation may institute proceedings in respect of any such liability on behalf of the corporation against such member or former member after notifying all other members of the corporation of his or her intention to do so."

5.2 Mr van Niekerk, relying on the judgment in **De Franca v Exhaust Pro CC**, 1997 (3) SA 878 (SECLD), submitted that the provisions of section 50(1) of the Act are limited to claims by a member of the corporation for the payment of damages by another member, and therefore do not cater for the relief sought in the present matter. To my mind, there is no substance in this argument.

5.3 The facts in **De Franca (supra)** differ materially from the facts in this matter. In De Franca one of the two members of a close corporation applied for the liquidation of the corporation alleging that it would be just and equitable to liquidate the corporation by reason of the complete breakdown of the relationship between the two members (father and son). De Franca opposed the relief sought "on behalf of the corporation", relying on section 50 of the Act for his *locus standi* to oppose. Nepgen J came to the conclusion that De Franca's reliance on section 50 was ill-founded given the circumstances of the matter. The learned judge's reasoning in this regard reads as follows:-

"*It is indeed so that s 50 of the Act relates to the situations where a close corporation's own rights are at issue, but this has nothing to do with proceedings such as the present. It is quite clear that what is provided for in s 50 of the Act is that a member of a close corporation may institute proceedings on behalf of the close corporation in respect of another member's or a former member's liability to the close corporation where such liability arises on account of a breach of the duty flowing from the fiduciary relationship that exists or existed. Without going into any great detail in this regard, there can be little doubt that the comment in Cilliers and others Close Corporations Service para 4.21 that the remedy provided by s 50 of the Act to enable proceedings to be instituted on behalf of a close corporation against fellow members was devised in order to provide for a simple and effective means to protect the interests of the close corporation, thus avoiding 'the uncertainty inherent in the common law derivative action and the time-consuming and risky procedure envisaged by s 266 of the Companies Act'. (See generally in this regard Cilliers and others Corporate Law 2nd ed at 292 para 19.7, 295 para 19.13-303 para 19.28.) Clear indications of what was intended by s 50 of the Act are to be found in ss (2) and (3) thereof, where there is specific reference to 'institution of such proceedings'; 'a withdrawal of the proceedings'; a 'settlement of the claim'; and to 'the defendant in question'. The statutory authority with which a member is vested where the provisions of s 50 of the Act are applicable is not unlimited authority. It is authority provided for the specific* *purpose of instituting the proceedings contemplated by s 50 of the Act. In my judgment the provisions of s 50 of the Act cannot, by any stretch of imagination, be interpreted in such a way that they vest a member of a close corporation with authority to oppose an application for its liquidation merely because another member, who is applying for its liquidation, has acted contrary to the duty arising from his fiduciary relationship and has thereby caused the close corporation to suffer a loss which in turn has resulted in him being liable to the close corporation therefor*."

(at 890 F to 891C).

In my humble view this reasoning cannot be faulted. Nepgen J apparently deliberately so, did not attempt to deliniate the applicability of section 50 of the Act, but merely concluded that the section was not devised as a tool for a member of a corporation to oppose the liquidation of a corporation on its behalf. I support the view of the learned judge that the remedy provided by section 50 of the Act "was devised in order to provide for a simple and effective means to protect the interests of the close corporation." Meskin, "Henochsberg on the Close Corporations Act", comments as follows on the provisions of section 50(1)(b) of the Act:

"*The liability envisaged by para (i) of this subsection is the liability envisaged by s 42(3)(a), ie for any loss suffered by the corporation as a result of the relevant breach of fiduciary duty or for the economic benefit derived by the delinquent by reason of such breach, and the claim, accordingly, would generally be a claim for damages equivalent to the amount of such loss or for an account in respect of such benefit and payment of the value* *thereof. However, it is not clear whether, by the use of the words "is liable" in sub-s (1), the intention is that the claim instituted as a result of a breach envisaged in para (i) is to be restricted to a monetary claim for the loss, or economic benefit envisaged by s 42(3)(a), or whether it extends to other rights of action which may arise from the relevant breach, eg a claim for an interdict against a member who unlawfully competes with the corporation as envisaged in s 42(2)(b)(iii) (which is a claim which would be available to the corporation in such circumstances). It is submitted that the intention of the Legislature in enacting s 50 is to enable a member of the corporation to protect its interests in the event of a breach by another member of his fiduciary duty to the corporation (**De Franca v Exhaust Pro CC** 1997 (3) SA 878 (SE); **Cuyler v Shiers**; **Cuyler v C & S Marketing** 1999 (3) SA 118 (W)); and that accordingly the liability envisaged by s 50(1) should not be limited to that for "loss" or "economic benefit" referred to in s 42(3)(a) but extends to other claims (eg for an interdict or other relief)."*

5.4 The relief applied for by the applicant on behalf of Bedshelf is to prevent the first respondent from withdrawing money or operating unlawfully on the bank account of the corporation, to restrain the first respondent from interfering in the management and affairs of Bedshelf, and for repayment of the funds allegedly unlawfully withdrawn from the bank account of the corporation. To my mind this conduct of the first respondent, if proved, would be tantamount to a breach of his fiduciary duties towards Bedshelf as contemplated in section 42 of the Act.

To interfere with the employees of the corporation and its suppliers to the detriment of the corporation, to my mind, amounts to a breach of the fiduciary relationship between a member and the corporation: more particularly if that interference is done in bad faith, as alleged by the applicant (see section 42(1) and (2) of the Act).

If money is withdrawn from the bank account of the corporation unlawfully, such withdrawal clearly amounts to an act of dishonesty and is not done in good faith.

5.5 For purposes of deciding the issue of *locus standi*, I have accepted the averments of the applicant contained in the founding affidavit. Whether those averments had been properly proved, will be dealt with hereunder.

5.6 I do agree with Mr van Niekerk that the relief claimed in paragraph 2.5 of the Notice of Motion falls outside the ambit of section 50 of the Act. I did not understand Mr Potgieter to contest this submission.

5.7 For these reasons the first point in limine is dismissed.

[6] Secondly Mr van Niekerk submitted that, since Bedshelf was deregistered at the time the application was launched, the

applicant lacked *locus standi* since, so argued Mr van Niekerk, a member cannot act on behalf of a non-entity.

6.1 It is common cause between the parties that Bedshelf was deregistered at the time of the launching of the application. It was "in deregistration" from 14 November 2009 until 11 October 2011, at which latter date it was reregistered.

6.2 Section 26 of the Act presently reads,

"*Sections 81(1)(f), 81(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.*"

This section effectively became operative at the commencement date of the 2008 Companies Act i.e. 1 May 2011. Prior to its amendment, section 26(7) of the Act read as follows:-

"*The Registrar shall give notice of the restoration of the registration of a corporation and the date thereof in the prescribed manner and as from such date the corporation shall continue to exist and be deemed to have continued in existence as from the date of deregistration as if it were not deregistered.*"

It appears to me that, by reason of the transitional arrangements contained in section 224(3) of the

Companies Act of 2008, read with paragraph 3(1) of Schedule 5 to that Act, reading,

"*Any matter pending before the Registrar under the previous Act, or a provision of the Close Corporation Act, Act No. 69 of 1984), amended by this Act, before the effective date and not fully addressed at that time, must be concluded by the Registrar in terms of such Act, despite its repeal or amendment.*

and since the reregistration of Bedshelf was still pending at 1 May 2011, the provisions of section 26(7) (as it read prior to the amendment) are applicable to the issue under consideration.

6.3 Mr van Niekerk contended that during the period when Bedshelf was deregistered, it was not possible for the applicant to act on its behalf, simply because there was no legal entity on whose behalf the applicant could act. In support hereof reliance was placed on the following *dictum* in **Walker Engineering CC v First Garment Rental**, 2011 (5) SA 14 at 16A, viz

"*The effect of deregistration is that its existence as a legal person ceases.*"

In this matter the defendant moved for absolution from the instance of the plaintiff's (a de-registered close corporation) action by reason of the plaintiff having failed to appear at the trial. The consequences of section 26(7) of the Act was not considered. However, in its deliberations the learned judge had this to say in regard to section 26(7):

"*The effect of re-registration is that the corporation would from the date of restoration of its registration continue to exist and 'be deemed to have continued in existence as from the date of deregistration as if it were not deregistered'. The potential restoration of the registration of the corporation entails that the action might be resumed at any time in the future and the defendant would have to continue to provide for that eventuality. The effect of s 15 of the Prescription Act is that the running of prescription against the corporation was interrupted when it served summons claiming payment of the alleged debt on the defendant. If the registration of the corporation were to be restored at any time in the future the plaintiff could, by reason of the deeming effect of s 26(7) of the Close Corporations Act and notwithstanding the intervening passage of time, resume the prosecution of the action.*"

(at 16D to F).

Mr van Niekerk further relied on **Miller & Others v Nafcoc Investment Holding Co Ltd & Others**, 2010 (6) SA 390 (SCA). This case concerned *inter alia* the validity of a decision by the Commissioner of Companies and the Master to authorize an enquiry into the affairs of a company in liquidation in terms of sections 417 and 418 of the 1973 Companies Act. The said decision was taken before the company was de-registered. The Court, per Cloete JA, reasoned thus why a decision to permit the continuation of the enquiry subsequently to the re-registration of the company, was not invalid:

"*But Serveco was restored to the register on 10 August 2008, before the application for final relief came before the court a quo on 13 November of the same year. I do not propose analyzing what effect in law the restoration of the company to the register had on the notices served on the individual applicants. That would be an academic exercise as new notices will have to be served on them if they are to be required to attend the enquiry. It was accordingly unnecessary for the court a quo to set the notices aside as it did in para 1 (c) of its order; and, once Serveco had been restored to the register, there was no basis for the order setting aside the decision of the commissioner (of the Master) to continue or permit the continuation of the enquiry. I reject the submission on behalf of the applicants that the authority of the joint liquidators, the Master and the commissioner – all of which was conferred before the deregistration – did not survive the deregistration, for the simple reason that all such authority was conferred before Serveco was deregistered, and there was no warrant for holding that events that occurred before the event are in any way affected by it*."

The right relied upon by the applicant is a statutory one that had been available to all members since the inception of Bedshelf, and was therefore, by analogy, "conferred" upon the applicant before the deregistration of Bedshelf. It follows therefore that this right survived the deregistration of Bedshelf, which was reregistered prior to the hearing of the application.

6.4 The Supreme Court of Appeal has endorsed the following dictum in **Mouton v Boland Bank Ltd**, 2001 (3) SA 877 (SCA) as apposite to close corporations under section 26(7) of the Act,

> "'*The effect of restoration to the register is that the company is deemed not to have been deregistered at all. This entails that all parties who have by deregistration of the company or thereafter acquired rights to assets which the company had upon deregistration will lose those rights as the assets will revert to the company. This includes assets which have become bona vacantia and as such accrued to the State. Likewise debtors and creditors of the company at the time of deregistration may upon restoration find their obligations or rights resuscitated.*"
> (at 880 J to 881 B).

6.5 In view of the aforesaid and the plain wording of section 26(7) of the Act, Mr van Niekerk's argument cannot be sustained.

6.6 There is a further reason why I deem the argument unsustainable. Although Bedshelf had been temporarily deregistered, it nevertheless continued to trade. It merely lost its corporate personality temporarily, but continued to exist *de facto*. It was during the time of its deregistration that the first respondent withdrew money from its bank account. Under these circumstances I fail to appreciate an attack on the *locus standi* of the applicant to protect the interests of Bedshelf. The applicant and the first respondent were the only persons who could protect the interests of Bedshelf, and the applicant undoubtedly had the *locus standi* to do that in his personal capacity.

[7] That brings me to the merits of the application and the relief sought.

[8] For the relief sought in paragraphs 2.1 and 2.2 of the Notice of Motion, the applicant relies on the following averments: Since his departure from Kleinzee, the first respondent no longer rendered any services to Bedshelf, has terminated his employment as an employee of Bedshelf, and is therefore not entitled to a salary any more. It is further alleged that in terms of a written resolution and instruction given to the second respondent, Bedshelf resolved that the applicant was the only member authorized to operate on its bank account to the exclusion of the first respondent. Despite the aforesaid, the first respondent nevertheless, since his departure from Kleinzee, withdrew a monthly salary, legal fees as well as an amount equal to a withdrawal made by the applicant from Bedshelf's bank account.

8.1 The first respondent admitted having withdrawn the aforesaid funds. He justifies his actions as follows:

8.1.1 As a member of the corporation and in terms of section 46 of the Act, he is entitled to participate in the carrying on of the business of the corporation.

8.1.2 Prior to his departure from Kleinzee it was agreed between himself and the applicant as members of Bedshelf that the corporation would continue to pay his salary until the purchase price for his member's interest had been paid by the applicant. This agreement had not been finalized, and he is therefore entitled to payment of his salary.

8.1.3 Since he is still a member of the corporation, he is entitled to be paid a pro rata payment of any payments made to the applicant by the corporation qua member.

8.1.4 The resolution and mandate given to the bank in terms whereof only the applicant is authorized to operate on the bank account of Bedshelf regulates the relationship between the corporation and the second respondent, but does not regulate the internal relationship between the corporation and its members. His authority to operate on this account is derived from the provisions of section 46 of the Act.

[9] To my mind the first respondent's reliance on section 46 of

the Act, is ill-founded. The words "carrying on of the business of the corporation" undoubtedly refer to the business of the corporation in the ordinary course and in the *bona fide* interest of the corporation. These provisions are clearly not designed to protect a member against improper or unlawful conduct in the management of the affairs of a corporation. These provisions, by necessary implication, are subject to the provisions of, for example, section 36(1)(b) and (c), and section 49(1) of the Act. I can think of no reason why these provisions would not be subject to the provisions of section 50 of the Act as well. Any contrary interpretation would render the provisions of section 50 of the Act a *brutum fulmen*.

[10] The first respondent's reliance on an agreement as referred to in paragraph 8.1.2 above, appears to be questionable. It is correct, as pointed out by Mr van Niekerk, that the draft written agreement for the purchase of the first respondent's interest in Bedshelf by the applicant in paragraph 1 thereof makes provision for the payment of the first respondent's salary until the purchase price had been paid.

10.1 However, it is common cause that this "agreement" had not been concluded between the parties yet.

10.2 Even if it can be accepted that the parties and the corporation orally agreed to the payment of his salary to the first respondent, it appears from the contents of paragraph 13 of the draft that the parties envisaged that the terms of the agreement would be executed within a period of three months, failing which the contract would lapse. It is therefore improbable that the parties agreed to the payment of the first respondent's salary for an indefinite period.

[11] For his argument that he is entitled to the same benefits as the applicant *qua* member of Bedshelf, the first respondent merely relies on his *de jure* membership of the corporation. In the absence of any agreement to this effect, and given the period the first respondent absented himself from the management and the carrying on of the business of the corporation, it is unlikely and improbable that such benefits accrued lawfully to the first respondent.

[12] I must confess that I find it difficult to comprehend Mr van Niekerk's argument alluded to in paragraph 8.1.4 above. If one takes into account that the interest the applicant wishes to protect in this application are those of Bedshelf, and that the said resolution and mandate was given to the second respondent by Bedshelf for purposes of regulating its banking facilities, I find it difficult to appreciate the argument that the aforesaid arrangement between the

corporation and the second respondent precludes the applicant, on behalf of the corporation, to act against the first respondent. The first respondent had not been authorized to operate on the bank account of Bedshelf. The first respondent's conduct is therefore unlawful and in breach of its fiduciary relationship with the corporation. Therefore the applicant is entitled to approach this Court under section 50 of the Act. As explained hereinbefore, it is of no avail to the first respondent to rely on the provisions of section 46 of the Act as justification for his aforesaid conduct.

[13] To my mind the probabilities favour the applicant that the first respondent's interference in the work force of the corporation and its suppliers were unwarranted, not in the interests of Bedshelf, and was not done in good faith. The applicant was accordingly entitled to approach this Court for the relief sought in regard hereto.

[14] The remaining issue that needs to be addressed, is whether the corporation is entitled to the relief set out in paragraph 2.3 of the Notice of Motion, i.e. for repayment of the funds withdrawn to date from the account of Bedshelf by the first respondent.

14.1 Although I have come to the conclusion that it is improbable that Bedshelf agreed to pay the first respondent's salary for an indefinite period, and that the withdrawal of the funds by the first respondent was at variance with the corporation's resolution and mandate to the second respondent, I cannot ignore the first respondent's averment that the parties agreed that the first respondent's salary would be paid by the corporation despite his relocation to Mussina.

14.2 That there is a ring of truth to this averment, is strengthened by the fact that the applicant waited until September 2011 before action was taken against the first respondent. I find it hard to believe that the applicant did not notice these withdrawals on the bank statements of the corporation which was done during June, July and August 2011.

14.3 The first respondent is still a member of the corporation with a 49 % interest. As such, it is difficult if not impossible, to determine whether the first respondent would not in any event be entitled to some benefit derived from profits or otherwise.

14.4 These issues had not been fully canvassed in these proceedings, and it appears that a number of factual disputes exist in regard thereto.

14.5 For these reasons I am not persuaded that the corporation is entitled to an order for repayment of the funds withdrawn by the first respondent. To my mind it will be fair and reasonable that these issues be ventilated by way of action procedure. Different considerations may come into play when the issues of liability are canvassed and determined.

[15] By reason of the aforesaid am I satisfied that the applicant has established a clear right to the relief sought in paragraphs 2.1 and 2.4 of the Notice of Motion. No case had been made out for the relief granted in paragraph 2.2 of the rule *nisi*, and I was not requested to confirm that portion of the rule.

[16] To my mind, Mr van Niekerk is correct in submitting that the relief claimed against the second respondent in paragraph 2.2 of the Notice of Motion falls outside the ambit of section 50 of the Act. The second respondent is neither a member nor a former member of the corporation. The relief hereto concerns the relationship between the corporation and the second respondent, and an alleged breach of a mandate given to the second respondent by the corporation. The applicant has no *locus standi* to claim such relief on behalf of the corporation.

[17] Mr van Niekerk did not advance any argument on the further requirements for the granting of a final interdict. I am satisfied that the applicant had no other satisfactory remedy but to launch this application. The applicant clearly demonstrated that the conduct of the first respondent was prejudicial to the corporation, and that the corporation suffered some loss as a result of the first respondent's unlawful conduct. The first respondent, by reason of his insistence on the entitlement of *inter alia* his salary, is sufficient proof of a well-grounded apprehension that, should the interdict not be granted, further losses in future may be suffered by the corporation.

[18] Mr Potgieter conceded that the applicant is not entitled to the relief sought in paragraph 2.5 of the Notice of Motion and same requires no further consideration.

[19] No argument had been advanced why the costs of the application should not follow on the result.

WHEREFORE THE FOLLOWING ORDER IS MADE:

1. PARAGRAPHS 2.1 AND 2.3 OF THE RULE NISI IS

HEREBY CONFIRMED WITH COSTS.

2. SAVE AS PROVIDED FOR HEREIN, THE RULE NISI IS DISCHARGED.

HJ LACOCK
JUDGE

For the Applicant:	Adv. Potgieter SC oio Towell & Groenewaldt Attorneys
For the 1st Respondent:	Adv. Van Niekerk SC oio Jooste Attorneys