



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)**

CASE NO: 2023/055569

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

30 September 2024.
DATE

.....
SIGNATURE

In the matter between:

LLUVIA TRADE DIVISION CC
(Registration No: 2011/078188/23)

Applicant

and

MICHIEL DE VRIES STASSEN

First Respondent

MORNE CORNEL STASSEN

Second Respondent

BENNIE KEEVY N.O.

Third Respondent

AMERASAN N.O.

Fourth Respondent

Third and Fourth Respondents cited in their capacities as the liquidators of KMSG Outsourced Services CC (in liquidation) (Master's Reference – G159/2023)

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email and by upload to CaseLines. The date and time for hand down is deemed to be 10h00 on 30 September 2024

JUDGMENT

VAN NIEUWENHUIZEN AJ

Introduction

[1] For the sake of convenience, the parties in this matter will be referred to as follows:

1.1 Lluvia Trade Division CC as “Lluvia” and where the context requires otherwise as the applicant

1.2 Michiel de Vries Stassen, as “Michiel”; and

1.3 Morne Cornel Stassen, as “Morne” and where the context requires otherwise the Stassens will be referred to as the respondents or 1st and 2nd respondent.

[2] In this matter, Lluvia seeks the following relief, i.e. that Michiel and Morne be held liable for the debts of KMSG in terms of section 64 of the Close Corporations Act 69 of 1984 (“the Act”) and, hence, a declaratory order is sought in the following terms:

- “1. The first and second respondents in their personal capacities are jointly and severally liable for the debts of KMSG Outsourced Services CC (in liquidation) to the applicant.*
- 2. That the first and second respondents are jointly and severally liable towards the applicant in the following respects:*
- 2.1 the first and second respondents are to pay the amount of R5 079 619.00;*
- 2.2 the first and second respondents are to pay the applicant interest on the aforesaid amount at 8.75% per annum, calculated from 7 May 2020 to date of final payment;*
- 2.3 the first and second respondents are to pay the applicant’s costs incurred under case number 31800/2021 as well as the costs of suit in respect of the current application both on the attorney and client scale.”*

The Facts

- [3] It is common cause that KMSG was the supplier of KN95 face masks and that Lluvia ordered a large quantity of these face masks (“the face masks”) for which it paid KMSG the amount of R5 079 619.00.

- [4] It is equally common cause that the face masks were sold without any regulatory approval, which, as later transpired, is required for KMSG to have sold the face masks.
- [5] On 5 July 2021, Lluvia instituted an application against KMSG to recover the said amount under Case Number 31800/2021, whereupon KMSG delivered a notice of intention to oppose.
- [6] On 3 September 2021, KMSG's attorney send an email wherein he admitted that KMSG did not, in fact, possess the relevant permit to sell the face masks.
- [7] Despite this admission, KMSG persisted with its opposition to the legal proceedings, yet it did not deliver an answering affidavit.
- [8] The aforesaid application was set down for hearing on 9 December 2021 and, on the day of hearing, KMSG delivered a notice in terms of Rule 6(5)(d(iii)) in which it contended that Lluvia's papers have not made a case for the relief sought and, as a consequence, the application had to be postponed.
- [9] The application was then heard on 20 May 2022 and judgment in same was handed down on 27 July 2022, in terms of which the court ordered that the matter be referred to trial and that the notice of motion was to stand as a simple summons.

- [10] On 15 August 2022, Lluvia delivered a declaration in terms of which it repeated its allegation that the face masks did not carry regulatory approval and that KMSG did not have a permit to sell them.
- [11] In its plea, KMSG denied the foregoing, despite the fact that its attorneys previously admitted that it did, in fact, not have a permit to sell the face marks.
- [12] On 27 September 2022, Lluvia applied for summary judgment.
- [13] No opposing affidavit was delivered.
- [14] On 8 November 2022, a day before the summary judgment application was due to be heard, KMSG's attorneys delivered a notice of withdrawal as attorneys.
- [15] The Stassens' attorney, Mr Warffemius, represented the Stassens and KMSG at all relevant times and is, in fact, even in this matter, the attorney of record.
- [16] On 9 November 2022, the court granted summary judgment against KMSG in the amount of R5 079 619.00, with interest and costs, per Wilson J.
- [17] When the Stassens did not honour the court order, Lluvia instituted liquidation proceedings against KMSG. The liquidation application was

heard and granted on 8 February 2023. Unbeknown to Lluvia, KMSG had, in the meantime, applied for its own voluntary winding up by means of a resolution, dated 6 February 2023.

- [18] In the Statement of Affairs, Form CM100, that has to be filed in order to obtain a voluntary liquidation, Michiel indicated that KMSG had no assets other than stock valued at R10 000.00. It is self-evident that, with that being the only asset in the estate and Lluvia's claims amounting to R5 079 619.00, there is no prospect of any dividend.
- [19] Lluvia instituted the present application to hold the Stassens liable in terms of section 64 of the Act.
- [20] Before dealing with the further pertinent facts, Lluvia's counsel raised a point *in limine*, i.e. that the Stassens' answering affidavit has been delivered out of time. The background is that the application was issued on 23 June 2023 and served on the respondents on 28 June 2023.
- [21] On 6 July 2023, a notice of opposition was received, but no answering affidavit followed within the prescribed time period.
- [22] The application was thus placed on the unopposed motion roll for hearing on 1 August 2023.

[23] On 28 July 2023, Warffemius requested a postponement in an email in which he committed to filing his clients' answering affidavits by 25 August 2023. From this email, it is clear that Warffemius wanted to consult with the National Regulator for Compulsory Specification ("NRCS"), hence the reason for his failure to answer the answering affidavit timeously.

[24] It was accordingly agreed that the answering affidavit could be filed late and an agreed order reading as follows was taken on 1 August 2023:

“[4] *Should the first and second respondents fail to comply with prayer [2] above, its notice to oppose is struck from the record and the first and second respondents agree to the granting of the relief sought by the Applicant, unopposed.*”
(my underlining)

[25] In terms of the court order, the Stassens were due to deliver their answering affidavits by 25 August 2023. This was not done and Lluvia had to enrol the matter on the unopposed motion roll as it was entitled to do. Nothing was heard from Warffemius as to the Stassens' failure to comply with the court order.

[26] On the day of the hearing, on 19 October 2023, the Stassens' counsel arrived at court and sought a postponement so as to allow the Stassens to bring an application for an extension of time. The application was thereupon removed from the roll for this purpose.

- [27] The Stassens delivered their affidavits later during the day, on 19 October 2023, i.e. two months after the date set by the court.
- [28] The Stassens afforded themselves about three months to deliver their answering affidavits.
- [29] It is trite that condonation for the non-compliance of the Rules of Court is not there for the asking. In this matter, there is not only a mere non-compliance with the Rules but an attempt on the part of the Stassens to amend an express and unequivocal court order.
- [30] The purpose of paragraph 4 of the court order was to draw a final line in the sand. This is something that was not only agreed by the Stassens but also made an order of court.
- [31] It was pointed out to me that courts do, from time to time, condone the non-compliance with timetables set out in court orders, but the formulation of the current order is different. It is perfectly clear, from paragraph 4, that its effect cannot be revisited. If one were to read it differently, it would defeat its very purpose.
- [32] The Stassens should have sought a formal amendment of the court order in terms of Rule 42. Nothing in the Warffemius' affidavit or the Stassens' affidavits speak to jurisdictional requirements of Rule 42. In effect, the Stassens simply proceeded filing their affidavits as if the court order was never given.

- [33] It was therefore submitted that an application for extension of time is bad in law.
- [34] It was further submitted that, even if the court were to find that the court order can be amended, which it is submitted is incorrect, Warffemius is, in any event, notably not laying blame on any force *majeure* to explain the Stassens' default. Instead, on his own version, he and the Stassens were solely to blame. He explains that he was "paralysed" by doubt as to whether his clients have a defence to the application. He then, rather astonishingly, admits to having explored possible avenues to compile a defence for his clients, only to conclude that the Stassens will be unable to prove this defence.
- [35] Despite the fact that Warffemius all but conceded that his clients do not have a defence and that their defence is doubtful, he is notably silent as to a timeline when he took the steps he put forward in his affidavit. This is important given the extraordinary delay in delivering the answering affidavit. It is expected of a litigant, who seeks an extension of time, to take the court into his confidence and explain the delay in detail. In this regard, the Stassens have done nothing.
- [36] On Warffemius' own version, the explanation put forward is not only inadequate but is, in fact, indicative of the Stassens' bad faith. I was specifically asked to view the Stassens' conduct and that of their attorney against the wider backdrop. It smacks of delaying tactics time after time.

[37] The legal proceedings were initiated in July 2021 but, at every pivotal point, the Stassens took steps to ensure maximum delay of the court proceedings (without ever having filed an affidavit until this application was brought) because they sought to hollow out KMSG so as to ensure that creditors, such as Lluvia, receive no dividend. The Stassens unambiguously admit in the current application that KMSG does not have the means to satisfy the judgment.

[38] This simple matter, which could have been concluded within a matter of a few months, has taken the better part of two years to be finalised. The Stassens, yet again, proved that they are repeat offenders when it comes to compliance with the Rules of Court and, in particular, the court order referred to above. I was specifically asked not to reward them for again using such questionable tactics.

[39] Even assuming that Warffemius wishes to take the blame, then the following detail would be applicable:

“There is a limit beyond which a litigant cannot escape the results of the attorney’s lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the rules of the court. Considerations ad misericordiam should not be allowed to become an invitation to laxity. In fact this court has lately been burdened with an undue and increasing number of applications for condonation in which the failure to comply with the rules of the court was due to neglect on the part of the attorney. The attorney after all is the representative whom the applicant has chosen for himself, and there is little reason why, in regard to condonation of a failure to comply with a rule of court, the litigant should be

absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are.”¹

[40] I was, therefore, urged not to grant any extension of time or condonation and that such an application should be dismissed with costs on a scale as between attorney and client. Should I arrive at this conclusion, paragraph 4 of the order referred to above would axiomatically become operative and the court is asked to confirm same.

[41] I have considered the position and, notwithstanding the consistent delays, assuming there was still room, despite the alleged laxity of Waffemius, to grant condonation, I would, in any event, have had to address the prospects of success in this application.

[42] Thus, without, at this stage, making any finding as to whether condonation can be granted, as opposed to the fact that no relief was sought under Rule 42 and paragraph 4 of the said order became operative, I nevertheless embark on an assessment of the prospects of success and merits of this application.

The Merits

[43] Section 64(1) of the Act contemplates three standalone grounds upon which a person can be held personally liable for a close corporation's

¹ *Saloojee NNO v Minister of Community Development* 1965 (2) SA 135 (A), at 141

debts, i.e. if he/she acted recklessly, with gross negligence or with the intent to defraud.

[44] It is emphasised that the Stassens have conceded that their conduct was negligent, albeit that they deny that they were grossly negligent.

[45] The founding papers indicate that all three grounds will be relied upon but, that notwithstanding, in argument Lluvia's counsel focussed on the admitted negligence and as to whether same equates to recklessness and/or gross negligence.

[46] It is trite that section 64 of the Act are modelled on those of section 424 of the Companies Act 61 of 1973 ("the Companies Act").

[47] Hence, the authorities in respect of the latter also apply to section 64 of the Act.

[48] The term "gross negligence" does not appear in section 424 of the Companies Act. It has been suggested that the term is superfluous and has no meaning differently from recklessly.²

[49] The SCA has held the following regarding recklessness and the standard at which directors are to be measured:

² See *Philotex (Pty) Ltd and Others v Snyman and Others; Braitex (Pty) Ltd and Others v Snyman and Others* 1998 (2) SA 138 (SCA), at 144A: "In its ordinary meaning therefore recklessly does not connote mere negligence but at the very least gross negligence and nothing in s424 warrants the words being given anything other than its ordinary meaning."

“‘knowingly’ means having knowledge of the facts from which the conclusion is properly to be drawn that the business of the company was or is being carried on recklessly; it does not entail knowledge of the legal consequences of those facts ... It follows that knowingly does not necessarily mean consciousness of recklessness.

Being a party a party to the conduct of the company’s business does not have to involve the taking of positive steps in the carrying on of the business; it may be enough to support or concur in the conduct of the business...’

As far as ‘recklessly’ is concerned, its meaning, to which the meaning of ‘recklessness’ corresponds, has been the subject of many reported judicial pronouncements. It suffices to refer to the following in Shawinigan v Vokins and Co Ltd [1961] 3 All ER 396 (QB) at 403F it was said that ‘recklessly’ means ‘grossly careless’ and that recklessness is

‘gross carelessness – the doing of something which in fact involves a risk, whether the doer realises it or not; and the risk being such, having regard to all the circumstances, that the taking of that risk would be described as ‘reckless’.

That definition seems, with respect, to involve some circuitry of reasoning but the important point it contains is the involvement of a risk, whether or not the doer realises it. That was the point adopted, together with indicia distilled from, inter alia, earlier judgments of this Court, in S v Van Zyl 1969(1) SA 553 (A) at 559D-G in arriving at the conclusion that the ordinary meaning of ‘recklessly’ includes gross negligence, with or without consciousness of risk-taking. In S v Dhlamini 1988 (2) SA 302 (A) at 308D-E gross negligence was described as including an attitude or state of mind characterised by ‘an entire failure to give

consideration to the consequences of one's actions, in other words, an attitude of reckless disregard of such consequences'.

The test for recklessness is objective in so far as the defendant's actions are measured against the standard of conduct of the notional reasonable person and it is subjective in so far as one has to postulate that notional being as belonging to the same group or class as the defendant, moving in the same spheres and having the same knowledge or means to knowledge: S v Van As 1976 (2) SA 921 (A) at 928 C - E. One should add that there may also be a subjective element present if the defendant has the risk-consciousness mentioned in Van Zyl but that, as indicated, is not an essential component of recklessness and its existence is no impediment to the application of the objective test referred to above.

It remains, as far as subjectivity is concerned, to warn that risk-consciousness in the realm of recklessness does not amount to or include that foresight of the consequences ('gevolgsbewustheid') which is necessary for dolus eventualis: Van Zyl at 558E, 559E--F. Accordingly, the expression 'reckless disregard of the consequences' in Dhlamini must not be understood as pertaining to foreseen consequences but unforeseen consequences - culpably unforeseen - whatever they might be."

- [50] In another judgment, the SCA has held the term "recklessly" to also entail the following enquiry:

"Acting 'recklessly' consists in 'an entire failure to give consideration to the consequences of one's actions, in other words, an attitude of reckless disregard of such consequences'. In the context of section 424, the court should

*have regard, amongst other things, to the scope of operations of the company ...*³

[51] While most of the reported case law on the topic entails directors or members of close corporations having recklessly dissipated the entity's assets in circumstances where they should have foreseen the company's demise and/or with the intention to thwart creditors, the term "recklessness" is nonetheless not limited to such instances. This is particularly important given the particular facts in this matter. It was, for instance, held in *Body Corporate of Greenwood Scheme v 75/2 Sandown (Pty) Limited and Others*⁴ that section 424 is not limited in its application to embracing solely the financial affairs of a company and that reference to "*the business of a company ... which was being carried on recklessly*" has a wider connotation. This, as was the case of the aforesaid judgment, also includes where a developer had erected dwellings in an improper and unworkmanlike manner in circumstances where the directors ought to have known that it was not compliant.

[52] It has further been held that, in order for section 424 to prevail, only a single act of recklessness will suffice (as opposed to a series of acts):

When one looks at the words of s 424 (1) in their context, there is to my mind no reason to interpret them in such a way as to exclude a single reckless or fraudulent transaction from the ambit of the section. The intention of the Act is plainly to render personally liable any person who is knowingly a party to the carrying on of any business of the company in a reckless or fraudulent manner. I agree with Mr Odes, for plaintiffs, that, having regard to the purpose of the section and the evil which the Legislature sought to combat by means of the section, there is no justification for thinking that Parliament intended to exclude from liability a director who has committed a massive fraud on a single occasion but to render

³ See *Fourie NO and Others v Newton* [2011] 2 All SA 265 (SCA), at para [29]

⁴ 1999 (3) SA 480 (W)

*liable a director who has stolen small amounts of money on a few occasions. If a transaction is part of the business of the company and it is executed recklessly or with intent to defraud creditors of the company or for any fraudulent purpose, it matters not, in my opinion, that it is done once or as part of a series of acts. In either case the guilty person may be visited with personal responsibility in terms of the section.*⁵

Respondent's Recklessness

[53] On the facts of this matter, it is not disputed that the face masks sold by KMSG did not carry the necessary regulatory approval. The Stassens concede that KMSG (of which they were the only two members) was (at least) required to determine whether the importer of the face masks had the necessary authority to import, sell and supply the face masks. Also, on their attorney's own version, KMSG did not have a permit to on-sell the masks.

[54] Due to KMSG's non-compliance with the statutory provisions, the NRCS subsequently ordered the face masks' destruction, rendering them worthless.

[55] The respondents, having conceded that they were negligent, do not agree that they were grossly negligent. They style their conduct to have been an "oversight on their part".⁶ Hence, it was argued that there is a concise question which should dispose of the other grounds upon which Lluvia relies:

⁵ *Gordon NO and Rennie NO v Standard Merchant Bank Ltd and Others* 1984 (2) SA 519 (C)

⁶ See para 6 of the Answering Affidavit.

“Where a close corporation trades in a particular industry, are its members deemed to be reckless if they fail to familiarise themselves with the relevant statutory provisions which regulate their industry?”

[56] The Stassens conceded that KMSG was part of a group of companies “whose business was the supply of all manner of sale items called Personal Protection Equipment” and that they had “purchased large quantities of K95 masks from a number of importers even before the outbreak of the Covid-19 pandemic”.⁷

[57] From this alone, it was submitted that KMSG held themselves out as specialist suppliers of face masks and personal protection equipment in general. The Stassens’ liability is aggravated given that they were transacting with (and in fact profited from) much needed and lifesaving medical equipment. Aside from the statutory provisions referred to below, it was submitted that, from a moral and ethical perspective, anybody who deals with medical products has an elevated duty to ensure that those medical products are safe and compliant. To this, I can add that to sell such equipment as an aid to prevent Covid-19 in the middle of the epidemic adds insult to injury.

[58] The respondents’ non-compliance with the statutory provision amounts to criminal conduct, which carries with it a fine and even imprisonment.⁸

⁷ Answering Affidavit para 20.3

⁸ Section 34 of the National Regulator for Compulsory Specifications Act 5 of 2008 reads as follows:

[59] It was put as follows to me as a rhetorical question:

“If the respondents have acted in a manner which is deemed to be criminal, how can it be that this does not also at least constitute reckless conduct on their part?”

[60] The Stassens may notionally wish to rely on ignorance of the law as a defence to any criminal charges. The Appellate Division has, however, made it clear that ignorance of the law is no defence (to criminal charges) where a person involves him/herself in a particular sphere and fails to keep him/herself informed of the legal provisions which are applicable to that sphere.⁹

[61] It is thus submitted that, on the Stassens own version, KMSG was involved in the sphere of personal protection equipment.

[62] It is submitted that, even if one is to assume, for the sake of argument, that the Stassens have a defence to a criminal conviction, that, from a public policy point of view, it should not have been a defence to civil liability when one is dealing with unregulated products which can potentially put people’s lives at risk. This is even worse once one takes into account that these masks were sold in the midst of the Covid-19 pandemic, where the public was under obligation by law to wear some kind of mask.

³⁴ *Offences and Penalties*

(1) *A person is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding one year if that person –*
 (a) *contravenes or fails to comply with section 14(1), (2) or (3), 19(2) or (20)(1)(a), (b) or (c);”*

⁹ *S v De Blom* 1977 (3) SA 513 (A)

[63] It was the Stassens' defence and, more specifically, that of Morne, that he was never involved in the day-to-day business of KMSG and that he was a mere "shareholder" without any executive function.¹⁰

[64] The notion of a mere shareholder or close corporation is foreign to the concept of close corporations. Its purpose is, after all, to not draw a distinction between directors and shareholders as one finds in the context of companies. Instead, members of a close corporation are both "directors" and "shareholders", or so it was submitted. This is a crude way of expressing the various caps worn by members of close corporations. As a member of a close corporation, one, by definition, has executive rights and, importantly, executive responsibilities, the aforesaid being a proper expression of the crude analogy referred to above.

[65] Hence, it was submitted that, by contending that one is a mere "shareholder" (presumably implying that he did not take part in the business) is not a proper defence. Hence, if Morne did not want to be held liable as a member, he should not have accepted the membership in the first place.

[66] It was, therefore, argue that Morne should be judged as one would judge a director of a company.

¹⁰ See Morne's (answering) affidavit para 4

[67] I was also referred to *Howard v Herrigel and Another*,¹¹ to the effect that it is not helpful and, in fact, misleading to classify a director as an “executive” or “non-executive” director. The legal rules apply to all the directors.

[68] It was further held that a director of a company has a duty to observe the utmost good faith towards the company and, in so doing, to exercise reasonable skill and diligence. In the context of section 424, so the Appellate Division held, he/she may be found to be reckless even in the absence of positive steps taken by him/her in the carrying on of the company’s business. In fact, it was held that the director’s supine attitude might even amount to concurrence in that conduct.¹²

[69] It was similarly held, in *Fourie v Braude and Others*,¹³ that a director can be held personally liable on the basis of recklessness if he had done nothing and had taken a supine attitude towards the affairs of the company.

[70] In the circumstances, it was submitted that the Stassens are to be held liable in terms of section 64 of the Act on the strength of their own admitted failure to familiarise themselves with the relevant statutory provisions alone.

¹¹ 1991 (2) SA 660 (A)

¹² See pp 677–678

¹³ 1996 (1) SA 610 (T)

[71] It is argued that there are further grounds to hold that the Stassens acted recklessly when one considers their conduct in general during the litigation.

[72] It was illustrated above that KMSG, under the control of the Stassens, managed to protract the legal proceedings against it for a substantial period. This while KMSG actually conceded, quite early on, that it did not, in fact, possess the relevant permit to trade with the face masks.¹⁴

[73] I was urged to take into account the timing of this concession. The Stassens suggest, in the current papers, that they are merely guilty of ignorance and that they had only recently gained knowledge of the relevant statutory provisions. On their attorney's own version, however, they were aware that they required regulatory approval (a permit) to sell the face masks. On a plain reading of Warffemius' email, it is not suggested that they were unaware of the regulations. To the contrary, the Stassens knew a permit was required. Yet, they continued to string Lluvia along during the litigation preceding the present application. Hence, it was submitted that the Stassens' belated feigning of ignorance is disingenuous and should serve as an aggravating factor in determining their culpability.¹⁵

¹⁴ See Founding Affidavit , para 25

¹⁵ Plaintiff's Particulars of claim para 25

- [74] Despite all of the aforesaid, KMSG later did a *volte-face* by delivering a plea wherein it denied not having the relevant regulatory approval.¹⁶
- [75] In yet another *volte-face* the Stassens concede, in the current application, that they did, in fact, not have the relevant regulatory approval. Also now, for the first time, after more than two years' litigation, the Stassens raised a completely new defence, i.e. that they were ignorant of relevant statutory provisions.¹⁷
- [76] Not only were their defences contradictory of each other, but it is clear that the Stassens flipped flopped on their version as and when it suited them. It was submitted that this should constitute a stand-alone basis to hold the Stassens to at least have been reckless.
- [77] A further stand-alone ground for personal liability lies in the allegation that the Stassens merely strung it along in the protracted litigation process so as to allow them to dispose of KMSG's assets (most likely to themselves and/or their acquaintances) at the expense of KMSG's creditors.¹⁸
- [78] Lluvia followed the allegation they made up with an invitation to the Stassens that, should they wish to dispute the allegation, they are to reveal to the Court KMSG's financial statements, tax returns and bank

¹⁶ Defendants Plea para 9 0 annexure MS 6 – read with the Answering Affidavit para 25

¹⁷ See Answering Affidavit para 6

¹⁸ See Founding Affidavit , para 40

statements for the last three years and to disclose in full what happened to all its assets.

[79] The Stassens' response was : "*I am advised that it is not incumbent on us to furnish any of the items referred to. There are mechanisms to achieve this.*"¹⁹

[80] The Stassens' unwillingness to take the Court into their confidence leads to the only logical conclusion, that Lluvia's assertion is well-founded. It is, after all, the legal position that, where facts fall within the exclusive personal knowledge of the disputing party, it is for that party to present countervailing evidence, failing which a real factual dispute will not be raised.²⁰

[81] At the very least, in the face of the application, one would have expected the Stassens to make full financial disclosure given the inferences that might be drawn from the CM100 and what appears to be a deliberate strategy of delay, which one may well speculate was for purposes of getting rid of such stock as was not, from a regulatory point of view, permissible to be sold.

[82] In the face of all of the aforesaid, there is a defence raised that Lluvia approached the Court with dirty hands, inasmuch as it embarked upon

¹⁹ See Answering Affidavit para 37

²⁰ *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA), at para [13]

selling the face masks without first enquiring into the legality of this activity. The *pari delicto* assertions can play no role given that Lluvia's underlying causa is in contract.

- [83] The fact remains that it is clear that KMSG was part of a group that specialised in protective equipment and that this was at the core of its business for quite some time. It is not unreasonable to suggest that, in those circumstances, they should have satisfied themselves that they are entitled to import, or sell, or supply the K95 face masks.
- [84] Seen as a whole, the conduct of the Stassens did not equate to that of mere negligence. They should have acquainted themselves with the statutory provisions pertaining to their business before they embarked thereon.
- [85] Taking into account every aspect of the Stassens' conduct cumulatively, including the strategic delays, it would appear to me that they certainly conducted the business of KMSG recklessly, not only in the sense that they did not comply with the law with regard to the K95 face masks, but also in that they strategically delayed the hearing of every facet of the matter from the company level to the present level so as to avoid liability and to minimise the assets available for distribution upon liquidation.
- [86] The strategic timing in the application for voluntary liquidation is also of some import and cannot be disregarded.

[87] On a conspectus of the facts before me the prospects of success for the Stassens' defences are in my view nil. It follows that no condonation should be granted.

[88] Strictly speaking the consent in paragraph 4 granted by Yacoob J should take effect.

[89] For the sake of clarity and form I will grant the orders set out below.

[90] All in all, I have no hesitation to grant the relief sought and make an order in the following terms:

1. Condonation for the late filing of the Respondents Answering Affidavit on 18 October 2023 is refused and similarly any extension of time in terms of Rule 27;
2. The First and Second Respondents, in their personal capacities are jointly and severally liable for the debts of KMSG Outsourced Services CC (In liquidation), owing to the Applicant.
3. The first and second respondents are jointly and severally liable to the applicant, the one paying the other to be absolved in the following respects:
 - 3.1 the first and second respondents are to pay the applicant the amount of R5 079 619.00;

3.2 the first and second respondents are to pay the applicant interest on the aforesaid amount at 8.75% per annum, calculated from 7 May 2020 to date of final payment;

3.3 the first and second respondents are to pay the applicant's costs incurred under case number 31800/2021 as well as the costs of suit in respect of the current application, both on an attorney and client scale.


S VAN NIEUWENHUIZEN AJ
ACTING JUDGE OF THE HIGH COURT

Date Matter Heard: 16 May 2024

Date Judgment delivered: 30 September 2024

Representation for applicant

Counsel: Adv JP Steenkamp
 Tel: 021 422 5875/084 356 1904
 Email: jpsteenkamp@capetownbar.co.za

Instructed by: Van der Meer & Partners Inc
 Tel: 021 979 2209
 Email: stephan@vdmattorneys.co.za
 c/o Couzyns Incorporated

Representation for first and second respondents

Counsel: BD Hitchings
 Group 21.
 Chambers
 No other Contact Information

Instructed by: Warffemius Van der Merwe Inc
 Tel: 082 561 8739
 Email: johan@wminc.co.za

Representation for third and fourth respondents

None