



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 200/2024

In the matter between:

HERMAN MERCER CROUS

APPELLANT

and

WYNBERG BOYS HIGH SCHOOL

FIRST RESPONDENT

EASTCO TRAVEL CC

SECOND RESPONDENT

LORRAINE FOURIE

THIRD RESPONDENT

Neutral citation: *Crous v Wynberg Boys High School and Others* (200/2024)
[2025] ZASCA 107 (18 July 2025)

Coram: MAKGOKA, WEINER, KOEN and BAARTMAN JJA and
TOLMAY AJA

Heard: 9 May 2025

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and released to SAFLII. The time and date for the hand-down is deemed to be 11h00 on 18 July 2025.

Summary: Close Corporations Act 69 of 1984 – section 65 – whether it automatically imposes joint liability on all members when gross abuse of juristic personality of corporation occurs.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Lenyai J, sitting as court of first instance):

1 The appeal is upheld with costs, including costs of two counsel, to be paid by the first respondent.

2 Paragraphs 6, 7 and 8 of the order of the high court are set aside and replaced with the following:

‘6 The second respondent is found to have grossly abused the juristic personality of the first respondent, and the first respondent is deemed not to be a juristic person for purposes of its liability towards the applicant.

7 The second respondent is ordered to pay R638 880 to the applicant.

8 The second respondent is ordered to pay the costs of the application.

9 The application against the third respondent is dismissed with costs.’

JUDGMENT

Makgoka JA *et* Tolmay AJA (Weiner, Koen and Baartman JJA concurring):

[1] This is an appeal against an order of the Gauteng Division of the High Court, Pretoria (the high court). The issue in the appeal is whether, by mere membership of a close corporation, members are automatically liable for the debts of such a corporation when gross abuse of the separate juristic personality of the corporation is established. The high court answered that question in the affirmative and made consequential orders which the appellant, Mr Herman Crous, is aggrieved by. He appeals against those orders, with the leave of this Court.

[2] Mr Crous and his daughter, Ms Lorraine Fourie, the third respondent, were the only members of the second respondent, Eastco Travel CC (the close corporation), a corporation incorporated in terms of the Close Corporations Act 69 of 1984 (the Act). Mr Crous held 49% membership in the close corporation, and Ms Fourie held the remaining 51%. The close corporation operated as a travel agency.

[3] The first respondent, Wynberg Boys High School (the school), launched an urgent application in the high court seeking the winding up of the close corporation. It also sought orders that the juristic personality of the close corporation be disregarded and that Mr Crous and Ms Fourie, jointly and severally, pay an amount of R638 880 to the school. The close corporation was the first respondent, and Ms Fourie and Mr Crous were, respectively, the second and third respondents. The close corporation and Ms Fourie did not take part in the appeal.

[4] The school alleged that Ms Fourie conducted a fraudulent business scheme through the close corporation. She offered heavily discounted flights on major airlines through the close corporation. Once an offer was accepted by a client of the close corporation, she insisted on upfront payment or a substantial deposit. She then purchased the flight tickets, and once they were issued, she would cancel the reservation. She would then obtain a refund from the airline and misappropriate the amount refunded.

[5] The school alleged that it fell victim to the scheme when it engaged the services of the close corporation to arrange and book flights for its learners to the United States of America. The close corporation was represented by Ms Fourie. In the process, the school is alleged to have lost R638 880. The papers indicate that there were many other people who also fell victim to the scheme. Although

the school alleged that Mr Crous was complicit either directly or indirectly in the scheme, no factual basis was laid for his alleged involvement. Mr Crous' alleged liability was based solely on his membership of the close corporation and his alleged duties flowing from that. Only Ms Fourie and the close corporation are mentioned in connection with the scheme.

[6] On the contrary, Mr Crous explained his limited involvement with the close corporation as follows. In 2008, he financially assisted Ms Fourie to start the business. However, once the business commenced trading, his involvement ended, and he was never involved in the management of the close corporation, nor did he ever receive any financial benefit from it. He is a pensioner, having retired from his position as a civil servant in December 2013.

[7] Mr Crous further explained that on 31 January 2014, he handed a letter to Ms Fourie 'resigning' as a member of the close corporation. Ms Fourie undertook to take the necessary steps to remove his name from the official records of the close corporation. He only became aware of the fact that his name was not removed during June 2023, when Ms Fourie informed him that she had applied for a loan to assist the close corporation. It was experiencing cash flow problems, and his signature was required by the financier. Although he was taken aback by this information, he nevertheless signed the documents. Mr Crous did not deny the allegations against Ms Fourie and the close corporation. But he was never involved in the running of the business, nor was he aware of any wrongdoing. Had he been aware, he would have acted to prevent the misappropriation of funds. He denied that he, as one of the members, abused the juristic personality of the close corporation.

[8] It is common cause that Mr Crous' letter purporting to resign from the close corporation had no legal effect on his membership. There is no provision in the

Act in terms of which a member can ‘resign’ from a close corporation. A member can disassociate him or herself from a close corporation by disposing of their membership. The procedure for doing so is set out in s 37 of the Act, in terms of which a member can transfer his or her membership to the remaining member(s) of a close corporation.¹ On the basis that Mr Crous’ purported resignation from the close corporation was legally ineffective, Mr Crous was, at all material times, a member of the close corporation.

[9] Based on the above factual matrix, the high court reasoned that Mr Crous should have ensured that the records of the close corporation at the Companies and Intellectual Property Commission (CIPC) were ‘correctly updated to show that he has resigned’. Because he had not done so, Mr Crous remained a member of the close corporation. Thus, said the high court, ‘he is putting himself to other third parties as a member, and he has a fiduciary duty’ to make sure that the close corporation is run in a manner that is not detrimental to members of the public. The high court further held that Mr Crous’ ignorance of the fact that his letter was legally ineffective, was no defence. It held that ‘it is trite in our law [that] if you are a registered member of a close corporation, you are liable for the actions of the close corporation’.

[10] Accordingly, the high court made an order for the provisional winding-up of the close corporation, together with ancillary orders. Relevant to the appeal are the orders in terms of which: (a) the close corporation was deemed not to be a juristic person for its liability towards the school; (b) Mr Crous and Ms Fourie

¹ Section 37 of the Close Corporations Act 69 of 1984 reads:

‘Every disposition by a member of a corporation of his interest, or a portion thereof, in the corporation, other than a disposition provided for in section 34, 35 or 36, whether to the corporation, any other member or any other person qualifying for membership in terms of section 29, shall be done-

(a) in accordance with the association agreement (if any); or

(b) with the consent of every other member of the corporation:

Provided that no member's interest shall be acquired by the corporation unless it has one or more other members.’

were: (i) found to have ‘unconscionably abused’ the juristic personality of the close corporation, and (ii) ordered, jointly and severally to pay the school the amount of R638 880, and (iii) ordered to pay the costs of the application. The order of this Court granting leave to appeal limited the appeal to these orders.

[11] In this Court, Mr Crous submitted that his mere membership of the close corporation was not enough to impute liability to him for the alleged fraudulent scheme conducted through the close corporation. The school supports the reasoning and order of the high court. It submitted that Mr Crous, in his capacity as a member of the close corporation, owed a legal duty to prevent the business from being conducted fraudulently.

[12] These submissions require an interpretation of the relevant provisions of the Act. Part I of the Act entrenches the juristic personality of close corporations. Section 2(2) thereof provides that upon registration, a close corporation becomes a juristic person until it is deregistered or dissolved. Of particular relevance to the appeal is s 2(3) under Part I. It sets out the default position about members’ liability for the liabilities of a close corporation, as follows:

‘Subject to the provisions of this Act, the members of a corporation shall not merely by reason of their membership be liable for the liabilities or obligations of the corporation.’

[13] Part VIII of the Act provides exceptions to this default position in s 2(3). It is titled ‘Liability of members and others for debts of close corporation’. Under this Part fall ss 63, 64 and 65. Section 63(a) provides joint liability for debts of a close corporation where the name of the corporation is used without the abbreviation ‘CC’. In this section, the liability of a member is limited to the member who is ‘responsible’ or who ‘authorised’ or ‘knowingly’ permits the omission. In other words, other members who did not authorise or know about the omission would not be held liable.

[14] Section 64 imputes personal liability to persons who may not be members of the close corporation, but who are ‘knowingly a party to the carrying on of the business ‘recklessly, with gross negligence or with intent to defraud any person or for any fraudulent purpose . . .’. The category of persons envisaged in this section includes people who are not members of the close corporation. In *Airport Cold Storage (Pty) Ltd v Ebrahim*² the court considered the liability of the son, who was the sole member, and the father, who was not a member, but who knowingly participated in the objectionable conduct of the business of the close corporation. Both were held liable for the debts of the close corporation in terms of s 65 of the Act. On appeal to this Court, in *Ebrahim and Another v Airports Cold Storage (Pty) Ltd*,³ this Court dismissed the appeal but relied on s 64 rather than s 65. However, this Court pointed out that both father and son knowingly participated in the conduct of the business of the close corporation.

[15] In the present case, the school relied on s 65 for imputing liability to Mr Crous. The section reads as follows:

‘Powers of Court in case of abuse of separate juristic personality of corporation

Whenever a Court on application by an interested person, or in any proceedings in which a corporation is involved, finds that the incorporation of, or any act by or on behalf of, or any use of, that corporation, constitutes a gross abuse of the juristic personality of the corporation as a separate entity, the Court may declare that the corporation is to be deemed not to be a juristic person in respect of such rights, obligations or liabilities of the corporation, or of such member or members thereof, or of such other person or persons, as are specified in the declaration, and the Court may give such further order or orders as it may deem fit in order to give effect to such declaration.’

[16] This provision must be interpreted in a unitary exercise in which we consider simultaneously the language, context and purpose of the provision, as

² *Airport Cold Storage (Pty) Ltd v Ebrahim and Others* 2008 (2) SA 303 (C).

³ *Ebrahim v Airport Cold Storage (Pty) Ltd* [2008] ZASCA 113; 2008 (6) SA 585 (SCA); [2009] 1 All SA 330 (SCA).

explained in *Natal Joint Pension Fund v Endumeni Municipality*.⁴ As to the language, it is clear that the jurisdictional trigger for personal liability in terms of s 65 is ‘gross abuse’ of the juristic personality of a close corporation.⁵ The liability is imputed to ‘...*such member or members thereof, or of such other person or persons, as are specified in the declaration...*’. The use of the words ‘such other persons’ makes it clear that the declaration for personal liability is not limited to members. As mentioned, even persons who are not members of a close corporation may be declared liable for the liabilities of a close corporation. (Emphasis added.)

[17] The purpose of the provision was evidently meant to cast the liability net wider where there has been a gross abuse of the juristic personality of a close corporation. The context of the provision is that it is part of the provisions in the Act which create an exception to the default position set out in s 2(3). As mentioned, in terms of that provision, members of a close corporation are not liable for the liabilities of a close corporation by their mere membership. Thus, s 65 demands something more than mere membership to impute personal liability to a member. That something more is conduct which amounts to, or contributes to, ‘gross abuse’ of the juristic personality of a close corporation by such a member. Any conduct short of this does not come within the purview of s 65.

[18] As explained, ss 63, 64 and 65 carve out exceptions to the general principle set out in s 2(3) that mere membership of a close corporation does not lead to liability in and of itself. What these exceptions demonstrate is that in each of them, for personal liability to arise against a member or any other person, such a

⁴ *Natal Joint Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593(SCA) para 18.

⁵ The high court incorrectly stated that there was ‘unconscionable abuse’ of the juristic personality of the close corporation. This was clearly a mistake by the Judge, as this is the terminology used in s 20(9) of the Companies Act 71 of 2008. The mistake seems to have been imported from the draft order handed up to the Court during the hearing of the urgent application. Nothing turns on this nomenclature.

member or person must have contributed to the impugned conduct. For liability to arise in terms of s 63(a), a person must have ‘authorised’ or ‘knowingly’ permitted the omission of the abbreviation ‘CC’ from the close corporation’s name. As for s 64, the impugned conduct is the carrying on of a business in a particular manner. Both these provisions limit liability to those who participated in the wrongdoing.

[19] The above analysis provides a useful context for the interpretation of s 65, in terms of which the impugned conduct is ‘gross abuse’ of the juristic personality of a close corporation. Similar to the other provisions, liability is linked to the conduct of a member or a person. This offers a harmonious and coherent reading of ss 2(3), 63, 64 and 65 of the Act. We therefore conclude that to impose liability in terms of s 65 on a member or any person, their conduct must amount to gross abuse of the juristic personality of a close corporation, or contributed thereto. It is not enough that they were members of the close corporation. Thus, the participation in the actual impugned conduct is required.

[20] The high court seemingly accepted Mr Crous’ uncontroverted evidence that he was not party to the gross abuse of the juristic personality of the close corporation. Despite this, it nevertheless imposed personal liability because it held that the mere membership of a close corporation is, without more, sufficient to impose liability on a member of a close corporation in terms of s 65. In this, the high court erred. As demonstrated above, s 65 does not apply only because of membership of a close corporation. It requires conduct which amounts to, or contributes to, the gross abuse of the juristic personality of the person against whom liability is sought.

[21] Equally untenable was the high court’s finding that the mere membership of a close corporation imposed a fiduciary duty on a member to ensure that the

affairs of a close corporation are managed in a manner not detrimental to members of the public. The fiduciary position of members is regulated in ss 42 to 52 of the Act under the heading 'Internal Relations'. Section 42 reads:

'Each member of a corporation shall stand in a fiduciary relationship to the corporation.'

It is thus clear that fiduciary duty is owed to the close corporation, and not to external parties. In other words, a member of a close corporation does not owe any fiduciary duty to external parties. On this basis, too, the high court was wrong to hold Mr Crous liable.

[22] In all the circumstances, the appeal must succeed. Costs should follow the result.

[23] The following order is made:

- 1 The appeal is upheld with costs, including costs of two counsel, to be paid by the first respondent.
- 2 Paragraphs 6, 7 and 8 of the order of the high court are set aside and replaced with the following:
 - '6 The second respondent is found to have grossly abused the juristic personality of the first respondent, and the first respondent is deemed not to be a juristic person for purposes of its liability towards the applicant.
 - 7 The second respondent is ordered to pay R638 880 to the applicant.
 - 8 The second respondent is ordered to pay the costs of the application.
 - 9 The application against the third respondent is dismissed with costs.'

T MAKGOKA
JUDGE OF APPEAL

R TOLMAY
ACTING JUDGE OF APPEAL

Appearances

For appellant: E Mann SC with E Propy

Instructed by: S Roux Inc., Pretoria
McIntyre Van Der Post, Bloemfontein

For first respondent: B J Manca SC with D Robertson

Instructed by: Dorrington Jessop Inc., Cape Town
Webbers Attorneys, Bloemfontein.