FA 10/2000

OSHUUNDA CC v B S BLAAUW & 1 OTHER

Teek, JP; Hannah, J, Maritz, J

2001/05/14

CLOSE CORPORATION

Action brought in terms of section 50 of Act 26 of 1988 must be brought in the name of a member on behalf of the corporation and not in the name of the corporation itself. The Court will not relax this statutory requirement.

Case No.: FA

10/2000

IN THE HIGH COURT OF NAMIBIA

In the matter between:

OSHUUNDA CC APPELLANT

and

BERNABE SCHALK BLAAUW FIRST RESPONDENT

HELENA CHRISTINA BLAAUW SECOND RESPONDENT

CORAM: TEEK, JP *et* HANNAH, J *et* MARITZ, J

Heard on: 2001-04-30

Delivered on: 2001-05-14

APPEAL JUDGMENT

HANNAH,J: This is an appeal from a decision of Manyarara, A.J. upholding a special plea, dismissing the action brought by the appellant and ordering one Hans Behring to pay the respondents' costs.

The special plea was to the effect that the appellant had no *locus standi* or authority to bring the action and it was advanced in the following circumstances. The appellant is a

close corporation established in terms of the Close Corporation Act, No. 26 of 1988' ("the Act"). At the time of the dispute with which the action was concerned the appellant had three members, namely the said Hans Behring and the two respondents. In the action the appellant alleged that the respondents had been in breach of their fiduciary duty towards it and had been negligent in the management of its business. The appellant claimed a statement of account, payment of a sum of money and the return of certain goods. In its particulars of claim the appellant averred that it was entitled to institute the action against the respondents by virtue of the provisions of section 50 of the Act.

Mention should be made at this stage of the power of attorney to sue which was fded with the registrar. This was signed on 4th December, 1998 by Behring "acting herein as a member of Oshuunda CC and in terms of Section 50 of the Close Corporation Act". Also fded was a document headed "Extracts from the minutes of the meeting of the Board of Directors of Oshuunda CC held at Windhoek on 4th day of December 1998". This document sets out two resolutions purportedly made by the "Board of Directors". One is a resolution that action be instituted against the respondents. The other is a resolution that Behring, in his capacity as a member of the appellant, be authorized and empowered to sign all documents necessary for the institution of the action against the respondents. The document is signed by Behring.

Quite apart from the fact that a close corporation is represented by its members, not directors, the document just referred to is obviously a fake. Obviously the respondents did not participate in a meeting at which it was resolved that they themselves be sued by the appellant. There was therefore no majority of members in favour of the institution of the proceedings with which we are concerned. However, that is only of marginal relevance to the special plea raised by the respondents in the Court *a quo.*

The special plea was concerned with the provisions of section 50 of the Act and in particular subsections (l)(b) and (3). These provide as follows:

"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 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 intention to do so.

(3) If a Court in any particular case finds that the proceedings, if unsuccessful, have been instituted without *prima facie* grounds, it may order the member who has instituted them on behalf of the corporation, himself to pay the costs of the corporation and of the defendant in question in such manner as the Court may determine."

The point taken by the respondents in the Court *a quo* was that in terms of section 50(1) Behring should have been plaintiff, not the appellant, and as it is clear that the majority of the appellant's members were not in favour of instituting the action the appellant had no *locus standi* to institute it. The learned judge in the Court *a quo* upheld this point and dismissed the action.

In his argument before us Mr Corbett, who appeared on behalf of the appellant, sought to contrast section 50 with section 49 of the Act. Section 49(1) provides:

"49(1) Any member of a corporation who alleges that any particular act or omission of the corporation or of one or more other members is unfairly prejudicial, unjust or inequitable to him, or to some members including him, or that the affairs of the corporation are being conducted in a manner unfairly prejudicial, unjust or inequitable to him, or to some members including him, may make an application to a Court for an order under this section."

Mr Corbett submitted that it is clear that section 49 is concerned with the situation where a member's own rights are affected whereas section 50 is concerned with the situation where the rights of the corporation itself are at issue. In support of this submission Mr Corbett referred to sections 42(3)(a) and 43(1) of the Act and to the following passage dealing with section 50 in Cilliers *et ah Corporate Law* (2nd ed) at p 609:

"The member institutes the action on behalf of the corporation. Therefore judgment is in favour of the corporation and the corporation is liable for costs and not the member acting on its behalf."

I have no difficulty in accepting Mr Corbett's submission thus far. When regard is had to the wording of section 50 it is clear that the member institutes the action on behalf of and for the benefit of the corporation. The section provides a remedy:

".....devised to avoid the uncertainty inherent in the common
law derivative action and the time-consuming and risky procedure envisaged by section 266 of the Companies Act."

Cilliers *et ah Corporate Law* (2nd ed) at p 608 quoted with approval in *Cuyler v C & L Marketing and Others* 1999(3) SA 118 (W) at 124 B-C and in *De Franca v Exhaust Pro CC (De Franca Intervening)* 1997(3) SA 878 (SE) at 890 H-I.

It is the next step in Mr Corbett's submission with which I have difficulty. He submitted that given the restricted ambit of section 50 and the fact that an action instituted pursuant to the section is for the benefit of the corporation there can be no bar to the corporation itself instituting the present action. Mr Corbett sought to obtain support for this submission in the following statement in Cilliers *et ah Corporate law* (2nd ed) at p 609:

"There is nothing in the Act prohibiting the corporation itself from instituting the action if the majority is in favour."

However, the support counsel seeks to obtain is, in my view, illusory. Of course the corporation can institute an action itself against a member who has caused it loss whether by breach of his fiduciary duty or his negligence or on any other ground; but the majority of members must be in favour of such action and the action is not then brought in terms of section 50. Section 50 provides a remedy where there is no such majority.

In my opinion, Mr Corbett's submission not only flies in the face of the clear wording of section 50 but to accede to it would give to a person such as Behring an unfair advantage never intended

by the Legislature. Section 50(3) is designed to render the member who has instituted the proceedings on behalf of the corporation potentially liable for costs if the court should find that the proceedings have been instituted without *prima facie* grounds. If Mr Corbett's submission is correct and the corporation can institute proceedings itself on the authority only of a minority member, as happened in the present case, then the minority member can avoid that potential liability for costs to the prejudice not only of the corporation but also to the prejudice of those members who are sued.-

In my judgment, the Court *a quo* was correct to find that the appellant had no *locus standi* or authority.

Anticipating the possibility of such a finding by this Court Mr Corbett made a further submission to the effect that this Court can and should condone non-compliance with the provisions of section 50. This submission can be dealt with quite shortly.

Mr Corbett pointed to the use in section 50 (1) of the words:" any other member of the corporation may institute proceedings

and submitted that the word "may" is indicative of permissive language. He then developed his argument by saying that when permissive words such as "may" are used in a statute they should *prima facie* be construed as directory unless the intention of the Legislature indicates otherwise. From this standpoint counsel submitted that noncompliance with the provisions of section 50(1) was not fatal and can and should be condoned.

In my view, Mr Corbett's submission is based on a fundamental flaw. All that the use of the word "may" in the subsection indicates is that the member concerned has a choice whether or not to institute proceedings. Once he exercises that choice in favour of instituting proceedings he must, in my view, do what he is enjoined to do by section

50(1), namely institute proceedings "on behalf of the corporation". No question of relaxing this

statutory requirement arises. I can therefore see no merit in Mr Corbett's further submission.

As for the question of costs, Mr Corbett sought to rely on the words of section 50(3) and submitted that the respondents did not make out a case that the proceedings had been instituted without *prima facie* grounds nor did the Court *a quo* so find. However, the proceedings were not properly brought in terms of section 50 and I see no reason why Behring should be permitted to rely on that section when it comes to the question of costs. The resolution signed by Behring that action be instituted against the respondents and the resolution that he be authorized and empowered to sign all necessary documents is clearly a fake to the extent that it purports to be a resolution of the appellant's directors/members and it was on the basis of these purported resolutions that Behring signed a power of attorney authorising the appointment of attorneys to act. It seems to me that it was Behring who was responsible for the costs which the respondents incurred both in the Court *a quo* and in this Court and in these circumstances it is only fair that he should be ordered to pay the costs.

For the foregoing reasons the appeal is dismissed and Hans Ernst Behring is ordered to pay the respondents' costs of the appeal.

HANNAH, J.

I agree

TEEK, J**.P.**

I agree

For the Appellant: Advocate A W Corbett

Instructed by: Messrs A Vaatz & Partners

For the Respondents: Advocate G H Oosthuizen

Instructed by: Messrs van der Merwe-Greeff