OSHUUNDA CC V BERNABE SCHALK BLAAUW AND ANOTHER

CASE NO. FA 10/2000

2001/08/29

Hannah, J., Maritz, J. *et* Hoff, J.

CORPORATE LAW

Locus standi – concept used in wider and narrower sense – "interest to sue" and "capacity to sue" – latter an incident of legal personality – legal *persona* may only act through human agency – may only sue if natural person acts under its authority.

Common law derivative action of shareholder plaintiff – plaintiff's position in such action compared with that of agent, trustee, curator, *gestor* or public-interest plaintiff – analogies appearing on first blush to have some resembling characteristics but none fits the role – position of such plaintiff *sui generis* and falls to be treated as such.

S.50 of Close Corporations Act, 1988 – purpose of – cannot draw on legal principles in law of agency to interpret the expression "on behalf of" in section – substantive remedy created by Legislature for member(s) to institute action against other member(s) for the benefit of the corporation – member must do so in own name – highly arguable that corporation should be cited as a nominal defendant in such an action.

CASE NO. FA 10/2000

IN THE HIGH COURT OF NAMIBIA

In the matter between:

OSHUUNDA CC **APPLICANT**

versus

BERNABE SCHALK BLAAUW **FIRST RESPONDENT**

HELENA CHRISTINA BLAAUW **SECOND RESPONDENT**

CORAM: HANNAH, J., MARITZ, J *et* HOFF, J.

Heard on: 2001.08.24

Delivered on: 2001.08.29

REASONS

MARITZ, J. : After hearing argument in this application for leave to appeal to the Supreme Court, we declined to grant such leave for reasons to follow and ordered Dr Hans Ernst Behring to pay the costs of the application, if any. These are the reasons.

In this application, as in the appeal, counsel purporting to act for the applicant corporation, submits that the trial court erred in law and on the facts in upholding a special plea that it had no *locus standi* or authority to institute an action against the respondents in terms of section 50 of the Close Corporations Act, 1988 ("s.50"). In support thereof, he filed extensive heads of argument in which he advanced a number of contentions with which we shall deal briefly hereunder.

He submits that a close corporation, such as the applicant, always has *locus standi* to institute legal proceedings against its members who, acting in breach of their fiduciary duties, have caused damage to the corporation. Now, the expression "*locus standi*" in our law is not used in one sense only. If counsel intended to use it in the sense of "an interest to sue", we have no quarrel with the argument. Generally, a corporation will always have standing in that sense to recover damages caused to it by such conduct. However, if counsel used the expression in the narrower sense of "a capacity to sue", the generalisation cannot stand unqualified. *Legitima persona standi in judicio* is, as Baxter, (*Administrative Law*, p. 648) points out, an incident of legal personality. Being a legal *persona*, a corporation cannot do anything, "except by human agency." (Meskin, "*Henochsberg on the Companies Act*", p. 127). It is only through such agency, if the natural person acts under its authority, that it can sue.

It is within the latter context that the respondents have challenged the applicant's "*locus standi* and authority" in their special plea. It is also on that basis that the matter has been decided – both *a quo* and on appeal. For the reasons stated in the judgment of this Court on appeal, the resolution on which Dr Behring purported to institute the action in the name of the corporation was clearly a fake. The corporation did not pass such a resolution and did not authorise him to institute the action on its behalf. In the absence of any actual authority, Dr Behring's counsel is seeking justification in the provisions of s. 50.

His reliance on that section presented yet another difficulty: The action was brought in the name of the corporation whereas the section requires it to be brought "on behalf of" the corporation. Hence, counsel's fiery attempt to persuade the Court that the provisions of s.50 reflect or embrace the laws governing agency. The member acts as an "agent" for and on behalf of a "principal" (the corporation) and because the real or intended beneficiary is the corporation, so the argument goes, an action under s.50 should be brought in the name of the "principal". It is with these submissions that our difficulties lie. Not only are they, in our view, insupportable in law but they also fly in the face of the express provisions of the section and the scheme contemplated by it. We have already stated our reasons for that conclusion in the judgment given on appeal but, inasmuch as the argument in support of the application for leave to

appeal focuses more on the analogies counsel is seeking to draw from principles relating to the law of agency, it is perhaps appropriate to address those submissions more pertinently in this judgment.

The reasons underlying the development of an equitable remedy in common law for minority shareholders to protect a corporation's interests (and indirectly also their own) against fraud by the majority have been summarised by Lord Denning MR in *Wallersteiner v Moir (No 2); Moir v Wallersteiner and Others (No 2),* [1975] 1 All ER 849 (CA) at 857d-f:

> 'If it is defrauded by a wrongdoer, the company itself is the one person to sue for the damage. Such is the rule in *Foss v Harbottle*. The rule is easy enough to apply when the company is defrauded by outsiders. The company itself is the only person who can sue. Likewise, when it is defrauded by insiders of a minor kind, once again the company is the only person who can sue. But suppose it is defrauded by insiders who control its affairs - by directors who hold a majority of shares - who can then sue for damages? Those directors are themselves the wrongdoers. If a board meeting is held, they will not authorise proceedings to be taken by the company against themselves. If a general meeting is called, they will vote down any suggestion that the company should sue them themselves. Yet the company is the one person who is damnified. In one way or another some means must be found for the company to sue. Otherwise the law would fail in its purpose. Injustice would be done without redress. In *Foss v Harbottle*, Wigram V-C saw the problem and suggested the solution. He thought that the company could sue 'in the name of someone whom the law has appointed to be its representative'. A suit could be brought –
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> > 'by individual corporators in their private characters, and asking in such character the protection of those rights to which in their corporate character they were entitled'"

Although Lord Denning, when dealing with the citation of the plaintiff in a derivative action, also compared the latter's position (as litigant

in his own name but in reality suing on behalf of the company) with that of an agent contracting in his own name "but in reality on behalf of his principal" (at p 858*g* of the Wallensteiner-case), Buckley, LJ. in a concurring judgement, adopted a different analogy to explain the position of a shareholder-plaintiff (at 865 *c*-*e*):

> "The position of a plaintiff in such an action is anomalous. Possibly the nearest analogy is that of a trustee who sues to protect his trust estate but has no personal interest in the relief sought, but this analogy is far from being an exact one."

In an informative article on the development of derivative remedies in a number of jurisdictions, Olivier C Schreiner ("*The Shareholder's Derivative Action – A Comparative Study of Procedures*", 1979 SALJ 203) points out that as the action has developed in Canadian Law the "shareholder plaintiff sues as guardian *ad litem* for the company…" (at p.234) and, in summary, expresses the view that the shareholder who initiates such a suit is, in truth, a "public-interest plaintiff" (at p.245). There may also be other analogies peculiar to the Roman Dutch common law that may be even closer, such as, for example, that of a *negotiorum gestor*.

Although all of those analogies at first blush appear to have some characteristics resembling the role of the shareholder-plaintiff in a derivative action, on closer scrutiny none of them exactly fit the role. The position of such a plaintiff is, in our view, one that is *sui generis* and falls to be treated as such. It would therefore be wrong to apply

the legal principles relating to any one of those analogies (e.g. the law of agency) to the common law derivative action. To give the shareholder- plaintiff in a derivative action the unfitting label of a known actor in our law, be it that of agent, trustee, curator or *gestor*, does not assist in defining his or her role and is likely to create more confusion than clarity – as is so apparent from the argument of Mr Behring's counsel.

He fallaciously equates the role of the shareholder-plaintiff in a derivative action with that of an agent acting on behalf of a principal. On that suspect foundation, he builds an extensive argument that Mr Behring had to institute the proceedings in the name of the close corporation, Oshuunda CC - as if the latter is the principal in whose name he as agent has to litigate. But the premise is unsound in common law. The contrary rather holds true: The requirement that a shareholder-plaintiff should litigate the rights of a corporation under the common law derivative action in his own name (and not in the name of the company) is one of the legal principles that distinguishes it from those under the law of agency.

Compounding the effect of his erroneous approach, counsel for Mr Behring is further seeking, by analogy, to interpret the provisions of s.50 as if the principles of the law of agency should be applied to it. So, for example, he seeks support in the words "on behalf of the corporation" in subsection (1) and the provisions of subsection (3)

that authorises a Court to order the member, who has unsuccessfully and without *prima facie* grounds instituted proceedings on behalf of the corporation, to pay the costs of the corporation and the defendant in question. It is evident from those provisions, so counsel argues, that the member (as agent) has to institute the s.50 proceedings in the name of the corporation (as principal).

The argument loses sight of the fact that it is not only an agent who, in our law, acts "on behalf of" another but also a trustee, curator, *gestor*, guardian (to mention only a few) and, for that matter, a s.50 member- plaintiff of a close corporation. There is also nothing in s.50(3) to suggest the interpretation urged upon us by counsel for Mr Behring. S.50 is primarily intended to be applied for the benefit of the corporation. That being the object, a member should not ultimately have to bear the costs reasonably incurred if he or she had *prima facie* grounds to institute the action – even if the action is unsuccessful. But should, for example, a vindictive member abuse the provisions of s.50 and institute an action *mala fides* without any *prima facie* cause, he or she may well be on the short end of an adverse costs order.

A closer reading of s.50(3) suggests an interpretation contrary to that advanced by counsel for Mr Behring. The subsection authorises the court, under given circumstances, to make an order that the member-plaintiff should "pay the costs of the corporation and of the defendant

in question..". It seems to us that the Legislature contemplated that the corporation may oppose the action and seek an order as to costs against the plaintiff member. The corporation is, after all, the one entity that is a necessary party because of its direct and substantial interest in the outcome of any s.50 proceedings purportedly instituted for its benefit. What if the corporation should resolve at a properly constituted meeting of members that the relief being sought under s.50 is not in its interests and that it should defend those proceedings? Will it then be precluded from doing so because the plaintiff-member has already instituted the proceedings in its name – as counsel for Mr Behring suggests it is obliged to do? Or will we have a singularly unique situation where the corporation should then apply to join the action as a defendant and litigate against itself: Oshuunda CC v Oshuunda CC and two member defendants? If the applicant's contentions are correct, who will appoint the counsel to act on behalf of the corporation to submit that the plaintiff member has instituted the proceedings without *prima facie* grounds and that the court should award costs in the corporation's favour – the plaintiff member?

By suggesting that the legal principles relating to the relationship between agent and principal apply to the common law derivative action or that s.50 should be interpreted in the light thereof, counsel for Mr Behring also loses sight of the fact that the Legislature created substantive remedies both in ss. 266 – 268 of the Companies Act, 1973 and in s.50 of the Close Corporations Act, 1988 that are wholly

different to the common law derivative action. As Schreiner, *supra*, pointed out on p.240 in relation to the provisions of the Companies Act, the Van Wyk De Vries Commission (whose recommendations in 1972 preceded the promulgation of the Companies Act) "was determined that a complete break with the common law (derivative action) was necessary." He refers to par. 42.13 of the Commission's report from which that much is evident: "The concept in pure law of the derivative action and the procedural aspects both bristle with so many difficulties that we can see no virtue in building on that foundation."

One should therefore be careful not to apply the principles of the common law derivative action (even if it is analogous to that of principal and agent or that of trust and trustee or that of a third party beneficiary and *gestor*) as a tool in the interpretation of the statutory remedies. The Legislature created in s.50 a complete remedy available to members of a close corporation to institute proceedings "on behalf of the corporation" against other members or former members liable under paragraphs (a) or (b) of subsection (1) thereof. Such an action must, in our view, be instituted in the name of such member(s) and not in the name of the corporation for the reasons mentioned in the appeal judgment. And in our view it is highly arguable that the corporation itself should also be cited as a nominal defendant.

We do not intend to make light of counsel's industry in preparing extensive argument if we find, for the reasons mentioned earlier, that the extensive submissions based on the law of agency and the interpretational inferences he has sought to persuade us to apply by parity of reasoning to s. 50, are irrelevant to the substance of the judgment of this court on appeal.

We therefore held that there was no reasonable prospect that another court of appeal would come to a different conclusion and thus made the following order:

1. Leave to appeal to the Supreme Court is refused.
2. Dr Hans Ernst Behring is ordered to pay the respondents' costs in the application, if any.

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Maritz, J.

I agree.

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Hannah, J.

I agree.

Hoff, J.