REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 2149/2008

In the matter between:

STANDARD BANK NAMIBIA LIMITED **PLAINTIFF**

and

ALEX MABUKU KAMWI **DEFENDANT**

Neutral citation: *Standard Bank Namibia Limited v Kamwi* (I 2149/2008) [2013] NAHCMD 63 (7 March 2013)

Coram: PARKER AJ
Heard: **11 February 2013**
Delivered: **7 March 2013**

Flynote: Statute – Interpretation – Close Corporation Act 26 of 1988, s 2(3) and 26(5) – While the application of s 2(3) is 'subject to' (ie limited by) the application of other provisions of the Act, s 26(5) is not and this provision is peremptory in its application.

Summary: Statute – Interpretation – Close Corporation Act, s 2(3) and s 26(5) - Court finding that while the application of s 2(3) is limited by the application of other provisions (including s 26(5)) s 26(5) is not so limited and its application is peremptory – The intention of the Legislature is to pierce the veil of incorporation and to make members personally liable for outstanding debts of the close corporation upon date of its deregistration – Piercing of veil of incorporation is therefore by operation of law.

Flynote: Contract – Formation of – Signature – Signature binds signatory upon the *caveat subscriptor* rule unless circumstances exist to make the rule inapplicable.

Summary: Contract – Formation of – Signature – Signature indicates the signatory's intention to be bound – The *caveat subscriptor* rule applies and is based on the doctrine of quasi-mutual assent – This rule does not apply where signatory was misled as to the nature of the document or as to its contents – Court finding that defendant does not contend he was misled into signing Annex C (attached to the combined summons) – Court therefore concluding that defendant is bound by Annex C.

ORDER

(a) The plaintiff's claim succeeds, and the defendant must pay the plaintiff –

(i) N$56 602.12, plus monthly compounded interest at the rate of 18.25 per cent, calculated from 8 July 2008 until date of final payment; and

(ii) costs of suit.

(b) The defendant's counterclaim is dismissed.

JUDGMENT

PARKER AJ:

[1] In this case, the efficacy and relevance of judicial case management (JCM) of proceedings of the court came to a sharp focus as shall become apparent shortly. On any pan of scale this matter is complex and has been long drawn out, having its

provenance in a dispute that arose between the parties resulting in the plaintiff instituting proceedings in July 2008 in which it claims the following relief:

> ‘(a) Payment of the sum of N$56 602.12;
> (b) Monthly compounded interest at 18.25% per annum as from 03/07/2007 until dated of payment;
> (c) Costs of suit;
> (d) Further and/or alternative relief.’

[2] Not much has been done previously to see to the end of this drawn out matter. In the cause of events there have been a maze of interlocutory applications and, of course, judgments of the court thereanent. I subjected the matter to JCM procedures which resulted in the parties filing a joint case management report in terms of rule 37(5) of the rules of court. In order to bring some order in the progression of the determination of the matter I made the following order on 15 November 2012:

> ‘1. The plaintiff’s legal representatives and the defendant must on or before 3 December 2012 file agreed or disputed points of law for argument in open court on a date to be arranged with the managing judge’s clerk.
>
> 2. They should file heads of argument in terms of the practice directions.’

[3] In obedience to the 15 November 2012 order, the parties filed the points of law that they require the court to adjudicate. The points of law so filed consists of ‘facts not in dispute between the parties’ and ‘points of law to be adjudicated upon’. I now proceed to determine the points of law that are in dispute.

‘2.1 Whether the Defendant in his capacity as sole member of the Close Corporation Nationwide Detectives and Professional Practitioners CC can be held liable for the debt of the Close Corporation as set out in Summary Judgment in Case No. I 2051/2007 and/or as set out in the Particulars of Claim I 2149/2009? ’

[4] Subsections (2), read with subsection (3), of s 2 the Close Corporation Act 26 of 1998 ('the Act') is the legal basis of the separate juristic personality of members of a close corporation. According to these provisions a member of a close corporation (CC) is not solely for the reason that he or she is a member of the CC liable for the liabilities or obligations of the CC. This statutory provision is not absolute; it admits of exceptions; hence the opening words of s 2(3), that is, 'Subject to the provisions of this Act ….' It follows that one must subject the application of 2(3) to some other provisions of the Act; and in that sense s 2(3) is 'subject to', that is, subservient to other provisions of the Act. In other words, the application of s 2(3) is limited by the application of other provisions of the Act. Section 2(3) provides:

'(3) *Subject to* the provisions of this Act, the members of a corporation shall not merely by reason or their membership be liable for the liabilities or obligations of the corporation.'

[Italicized for emphasis]

[5] Thus, in terms of s 2(2) of the Act the separate juristic personality of a CC does not exist *ad infinitum*; it ceases to exist upon the deregistration of the CC in question, as the operation of s 2(3) is 'subject to', that is limited by the operation and application of other provisions of the Act. One such provision is under s 26(5) of the Act. Section 26(5) provides:

'(5) If a corporation is deregistered while having outstanding liabilities, the persons who are members of such corporation at the time of deregistration shall be jointly and severally liable for such liabilities.'

[6] Thus, while, as I have said previously, s 2(3) of the Act is 'subject to', that is limited by, other provisions of the Act, there is not one word in s 26(5) which make its application limited by the application of any other provision of the Act. In that sense, unlike the application of s 2(3), the application of s 26(5) is not limited by any provision of the Act, and its application is peremptory, as Ms Williams submitted. In any case, I did not hear the defendant argue contrariwise. Thus, the intention of the Legislature which is expressed clearly and unequivocally in s 26(5) is that the

members of a CC which is deregistered and has outstanding debts are jointly and severably liable for such outstanding debts which existed upon deregistration. I do not read s 26(5) to provide that for s 26(5) to come into operation the 'plaintiff was first supposed to lift the corporate veil by making application to court', as the defendant contends. Indeed, in terms of s 26(5) of the Act the piercing of the veil of incorporation enures by operation of law. That is the interpretation and application of s 26(5) of the Act. It follows inevitably that I should reject the defendant's argument: it is not in accord with the clear and unambiguous provisions of s 26(5) of the Act. For all the above reasoning and conclusions, I hold that the defendant is liable personally for the debts of the CC as set out in the Summary Judgment in Case No. I 2051/2007 and/or as set out in the Particulars of Claim in Case No. I 2149/2009. The point of law in para 2.1 is, therefore, determined in favour of the plaintiff.

'2.2 Whether the Defendant's Counterclaim should be submitted for taxation.

2.3 Whether the Defendant is entitled to wasted costs as set out in his Counterclaim.

2.4 Whether the Notice of Withdrawal and/or Court Order in case no. I 2051/2007 entitles the Defendant to the costs as claimed in its Counterclaim.'

[7] I proceed to consider these three points together because they are intertwined. The entitlement of a party (X) to wasted costs where proceedings instituted against X by a party (Y) is governed by rule 42(1) of the rules of court. Rule 42 provides:

'(1)(a) A person instituting any proceedings may at any time before the matter has been set down and thereafter by consent of the parties or leave of the court withdraw such proceedings, in any of which events he or she shall deliver a notice of withdrawal and may embody in such notice a consent to pay costs, and the taxing master shall tax such costs on the request of the other party.'

[Italicized for emphasis]

[8] As appears at para 18 of the judgment of the court (per Tommasi J ('the 18 June 2012 judgment')) in an interlocutory application under this selfsame case, the

plaintiff (Y) having withdrawn the proceedings against the defendant (X) 'admitted that it had tendered wasted costs of the defendant (X) and that it (Y) had refused to pay the defendant (X)'. Tommasi J proceeded thus: 'The plaintiff itself was entitled to request that the invoice (raised by the defendant as representing his wasted costs) be taxed as this is provided for by the rules but opted to refuse payment'. According to Tommasi J, 'The plaintiff now argues that the defendant should have his invoiced taxed whereas they (ie the plaintiff) had tendered to pay the wasted costs'.

[9] The defendant is extremely enamoured with this naked statement made 'in passing' by Tommasi J in the 18 June 2012 judgment: 'I mention *in passing* that the plaintiff did not request for the costs to be taxed as it was entitled to do in terms of rule 42(1)(a) (of the rules of court)'. (Italicized for emphasis) Based on this statement made *'in passing'*, the defendant contends, 'This simply means (the plaintiff) has abandoned the relief of taxing my costs it now claims'.

[10] The defendant's enthusiasm is, with respect, misplaced. Tommasi J could not have meant that the plaintiff who tendered the wasted costs was entitled to cause the invoice taxed and if the plaintiff did not do that, then the plaintiff 'has abandoned the relief of taxing my costs it now claims'. My learned Sister Tommasi J could not have meant that – as I say – because the defendant's contention does not accord with the interpretation and application of rule 42(1) which I have put forth previously. A priori, it need hardly saying that the defendant's further contention that 'the plaintiff has failed to comply with rule 42(1)*(a)* has not a wraith of merit. It is rather, as I have found previously, the defendant who refuses to comply with rule 42(1)*(a)* of the rules.

[11] With the greatest deference to the defendant, the defendant misreads rule 42(1)*(a)*. In terms of rule 42(1)*(a)* where X ('a person') consents to pay wasted costs because X has withdrawn proceedings against Y ('the other party'), 'the taxing master shall tax such costs *on the request of the other party* (Y). (Italicized for emphasis) *In casu*, the defendant is the 'other party' and so 'the taxing master shall tax such costs on the request of the defendant ('the other party').

[12] It is, thus, abundantly clear from the interpretation and application of rule 42(1)*(a)* that the taxing master must tax the wasted costs '*on the request of*' the defendant. (Italicized for emphasis) It is therefore the defendant (not the plaintiff) who is entitled to request the taxing master to tax the wasted costs. And for completeness, as respects the question of costs awarded in favour of a lay litigant, I shall repeat what I said in *Alex Mabuku Kamwi v M B De Klerk & Associates* Case No. I 3086/2006 (judgment delivered on 8 May 2012). In that case – quite significantly – the defendant in the present case was the plaintiff. I stated as follows in *Alex Mabuku Kamwi v M B De Klerk & Associates* (para 3):

'*A fortiori*, para (b) of the 11 December 2009 order is in full compliance with the high authority of Shivute CJ, who wrote the unanimous judgment of the Court, in *Nationwide Detective and Professional Practitioners CC v Standard Bank of Namibia Ltd* (the Supreme Court judgment) (2008 (1) NR 290 (SA) at 303H-304B), which the applicant referred to me, in the following succinct passage in para 41 thereof (at 303H-304B):

"It is true that the court *a quo* held that when dealing with an award of costs in favour of a lay litigant, *a court must specify that such costs are limited to disbursements*, but it seems to me that disbursements are but a genus of costs the other being fees and that in specifying the extent of the costs to be paid to the lay litigant, the court is making an 'order as to costs left to the discretion of the court".'

I concluded in that case (para 6) that –

'The *ratio decidendi* of the Supreme Court judgment is that (1) when dealing with an award of costs in favour of a lay litigant, a court must specify that such costs are limited to disbursements and (2) since disbursements are but a genus of costs, the other being fees, when specifying the extent of the costs to be paid to the lay litigant, the Court is making an order as to costs left to the discretion of the Court, and so the Taxing Master has the power to tax "the extent of costs to be paid to the lay litigant", being disbursements.'

[13] The upshot of the aforementioned *ratio decidendi* of *Nationwide Detective and Professional Practitioners CC v Standard Bank of Namibia Ltd* is that if the defendant made the request to the taxing master to tax the costs in terms of rule 42(1)*(a)*, the taxing master must tax 'the extent of costs to be paid to the lay litigant',

being the defendant. I think I should, with the greatest deference to my learned Sister Tommasi J, point it out that the statement in para 9 of the 18 June 2012 judgment of my learned Sister Tommasi J is not correct, and so I shall not follow it. There, my learned Sister Tommasi J stated: 'The Supreme Court has not therefore expressed itself on the issue of costs payable to a person who litigates in person'. The learned judge's attention was definitely not drawn to the Supreme Court judgment in *Nationwide Detective and Professional Practitioners CC v Standard Bank of Namibia Ltd* 2008 (1) NR 290 (SA) (referred to in para 12, above).

[14] It follows that in my judgment, in terms of rule 42(1)*(a)*, it is the defendant who should request the taxing master to tax the defendant's costs (in the form of the invoice); for, the defendant is the 'other party' (to quote the words of rule 42(1)*(a)*) in the proceedings to whom costs are to be paid; and in any case, the plaintiff has admitted its liability to pay the costs. The defendant, with respect, appears to conflate an agreement to pay costs with an agreement to pay the extent of costs. The two are polar apart. *In casu* the plaintiff has agreed to pay costs; but it has not agreed to pay the extent of costs, which the plaintiff disputes. And it is the statutory duty of the taxing master to tax the costs, that is, to determine the extent of costs to be paid. In this regard, the point must be signalized that it does not lie in the power of the court to tax bills of costs; that is the province of the taxing master. Thus, in the instant case if the court determines the extent of costs in the counterclaim it would in effect be assuming the powers of the taxing master who is empowered by law to tax costs. The court would be acting *ultra vires*. (See *Nate Ndauendapo & Associates v Aussenkehr Farms (Pty) Ltd and Others* 2007 (1) NR 162.) It would seem this legal reality eludes the defendant.

[15] It follows inevitably *a priori* that in my view the defendant is entitled to wasted costs but the extent of costs to be paid by the plaintiff to the defendant cannot be claimed in a counterclaim until and unless the costs have been taxed by the taxing master and an *allocatur* is issued in that behalf on account of the dispute respecting the extent of the defendant's costs. (See *Nate Ndauendapo & Associates*) For all the aforegoing, I conclude that paras 2.3, 2.4 and 2.5 are also determined in favour of the plaintiff. In sum, the costs that the plaintiff admits liability for must be taxed since

the extent of the costs is disputed. It is after the costs have been taxed that proceedings (in this case, in the form of counterclaim) can be instituted to enforce the payment of the extent of costs so taxed and an *allocatur* so issued therefor.

> '2.5 Whether the Plaintiff's action in Case No. I 2149/2008 against the Defendant is vexatious.
> 2.6 Whether the Plaintiff after withdrawing action I 2051/2007 is entitled to institute action against the Defendant on the same grounds or cause of action.
> 2.7 Whether the Plaintiff has abandoned the relief it now claims in this action.'

[16] These three points of law relate to the same issue surrounding the fact that the plaintiff instituted proceedings (Case No. 2051/2007) against the defendant but later on withdrew the proceedings, and subsequently instituted other proceedings (Case No. I 2149/2008). As I understand the three interconnected points of law, the argument raised by the defendant is immanent of the plea in abatement of *res judicata*, albeit the defendant does not say so in so many words. In order to succeed in his contention, therefore, the defendant must establish the presence of all these three requirements, namely, (a) the prior action (Case No. I 2051/2007) must have been between the same parties or their privies, (b) the prior action must have concerned the same subject matter and (c) the prior action must have been founded on the same cause of action. Thus, unless all these three essentials are present, the defendant must fail in his contention. (See I Isaacs*, Beck's Theory and Principles of Pleadings in Civil Actions* 5th ed (1982): para 78, and the cases there cited.) The defendant must, therefore, prove the plea of *res judicata* that he in essence contends. (*Lowrey v Steedman* 1914 AD 532) And what proof has the defendant put forth to establish his contention? It is only this, and it is encapsulated in his written submission:

> '(i) The facts (sic) that as the sole member of the close corporation I am in terms of section 26(5) of the Close Corporation Act No 26 of 1988 liable for jointly and severally, alternatively jointly for the debts of the corporation is withdrawn against me;
>
> (iii) The fact that I have allegedly bound myself as surety and co-debtor with the close corporation for its debts is withdrawn;

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(a) The claim against me in the sum of N$56 602.12 which was allegedly jointly and severally, alternatively jointly liable is withdrawn;

(b) The claim of a monthly compounded interest at the rate of 18.25% p.a. which I was jointly and severally, alternatively jointly liable is withdrawn;

(c) The claim of costs of suit is withdrawn;

(d) The further and/or alternative relief claim is withdrawn;

(e) I am also withdrawn from being a party to these proceedings.'

[17] Ms Williams's contrary submission is that the proceedings instituting by the plaintiff against the defendant under Case No. I 2149/2008 (the present proceedings) are not the same as the proceedings that had been instituted by the plaintiff against the defendant under Case No. I 2051/2007. Counsel's reason for so submitting are these: The proceedings instituted under Case No. I 2051/2007 was based on contract, that is, on the basis of the surety agreement signed by the defendant, but the proceeding under Case No. I 2149/2008 are based on the plaintiff holding the defendant personally liable for the debts of the CC in terms of s 26(5) of the Act.

[18] What the defendant has put forth in respect of paras 2.5, 2.6 and 2.7 do not answer the submission by Ms Williams on those paragraphs; and, *a fortiori*, they do not prove the plea of *res judicata* raised. I accept Ms Williams's submission that the prior proceedings (under Case No. 2051/2007) do not concern the same subject matter and are not founded on the same cause of action. That being the case, I find that two essentials ((b) and (c)) proposed by the aforementioned authorities are not present in present proceedings. This finding impels me to the inexorable conclusion that the points of law under paras 2.5, 2.6 and 2.7 should also be determined in favour of the plaintiff. It follows that the proceedings instituted by the plaintiff under Case No. I 2149/2008 (the present proceedings) against the defendant are not vexatious; and the plaintiff has not, therefore, abandoned the relief it claims in these proceedings.

'2.8 Whether the Defendant is bound by his signature affixed (to Annexure "C") on a document he did not read and/or informed of the terms contained therein.'

[19] The defendant's reasons for disavowing Annex C (annexed to the combined summons (filed on 8 July 2008)) are set out in his submission, thus:

'First I was only informed that the close corporation's overdraft is approved. Secondly I was shown a places (sic) where I should initial and where I should sign. Third I was informed that the money will be in the account the next day on 18 March 2004. I did not know the document contained contractual terms binding me or else if I would have known I would not have signed the document and no step was taken to draw my attention to the contractual terms contained therein.'

[20] It is a general principle of our law that a person who signs a contractual document thereby signifies his assent to the contents of the document and if the contents subsequently turn out not to be to his or her liking, as is in the present case, he or she has no one to blame but himself. (R H Christie, *The Law of Contract in South Africa*, 5th ed (2006): pp 174 – 175). This is the *caveat subscriptor* rule which Ms Williams reminded the court about. And the true basis of the principle is the doctrine of quasi mutual assent; the question is simply whether the other party (in this case the plaintiff) is reasonably entitled to assume that the signatory (in this case the defendant), by signing the document, was signifying his intention to be bound by it (see Christie, *The Law of Contract in South Africa*, ibid., p. 175). The only qualification to the rule is whether the signatory had been misled either as to the nature of the document or as to its contents. (Christie *The Law of Contract in South Africa*, ibid., p 179) I find that this qualification does not apply to the instant case because that is not contended by the defendant. That being the case, the full force of the *caveat subscriptor* rule must apply in these proceedings and so I apply it. It follows that in my judgment the defendant is bound by Annex C; and if Annex C is not 'to his liking he has no one to blame but himself'. Accordingly, I hold that the defendant is bound by Annex C. Paragraph 2.8 of the points of law is, therefore, also determined in favour of the plaintiff.

[21] The purpose of determining the points of law that are in dispute is to curtail proceedings and dispose of the matter expeditiously and in a fair and just manner so as to save costs. That is also the understanding of the defendant and Ms Williams, as I gather from their submissions. Thus, the findings I have made dispose of this matter and brings it to finality.

[22] From the determinations I have made respecting paras 2.1 – 2.8 of the 'Points of Law to be adjudicated upon' in paras 3 – 20, above, I make the following order:

(a) The plaintiff's claim succeeds, and the defendant must pay the plaintiff –

(i) N$56 602.12, plus monthly compounded interest at the rate of 18.25 per cent, calculated from 8 July 2008 until date of final payment; and

(ii) costs of suit.

(b) The defendant's counterclaim is dismissed.

C Parker

Acting Judge

APPEARANCES

PLAINTIFF :	C R Williams Of Andreas Vaatz & Partners, Windhoek
DEFENDANT:	In person