



**HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
JUDGMENT**

HC-MD-CIV-AC 2016/03173

In the matter between:

TEICHMANN PLANT HIRE (PTY) LTD

PLAINTIFF

and

ROBERTH COETZEE

1ST DEFENDANT

EMGARD COETZEE

2ND DEFENDANT

*Neutral citation: Teichmann Plant Hire (Pty) Ltd v Coetzee (HC-MD-CIV-AC
2016-03173) [2017] NAHCMD 61(8 March 2017)*

CORAM: MASUKU J

Heard: 16 February 2017

Delivered: 8 March 2017

FLYNOTE: RULES OF COURT – Rule 61 – Summary Judgment – its nature and effect – Rule 65 - the nature of an application envisaged in s 64 of the Close Corporations Act 28 of 1988 (the Act) LEGISLATION – Close

Corporation Act – Piercing the Corporate veil – Circumstances under which it can be done.

SUMMARY: The plaintiff a company incorporated in terms of the Company laws of , obtained a judgment by default against an entity trading as Kubaraf Development CC in the sum of N\$ 521 729.70 plus interests and costs. The plaintiff sued the defendants in their personal capacities as alleged members of Kubaraf, as a result of alleged reckless trading or with intent to defraud creditors, and in particular the plaintiff. The main question for determination was whether one can move a summary judgment application based on section 64 of the Act without having made an application in terms of that section for a determination that the defendant should be held personally liable for the debt of the Corporation.

Held – that the 2nd defendant deposed on affidavit, together with supporting documents that she was never at any stage a member of the Close Corporation. The court held that that allegation raised a triable issue entitled the 2nd defendant to leave to defend the action.

Held further – that the 1st defendant on oath denied the averrals attributed to the deputy sheriff regarding him having sold the assets of the Close corporation. The 1st defendant also deposed that he was involved in a serious motor vehicle accident that resulted in him being hospitalized for a long time, resulting in the business of the Close Corporation becoming moribund. The Court held that this allegation also constituted a triable issue and may have served to detract from an inference that the 1st defendant had traded in a gross negligent, fraudulent or reckless manner.

Held – that an application envisaged in s 64 comprises of a notice of motion, accompanied by an affidavit or affidavits as provided in rule 65 of the High Court rules, setting out the basis for the liability claimed.

Held further – that a close corporation has a separate juristic personality from its members and for that reason it should be held liable for debts it incurs. That notwithstanding, where it is alleged that a member conducted the

business of the corporation in a gross negligent, fraudulent or reckless manner, on application by the Master of the High Court, a creditor or liquidator etc., the court may order that a member or such other person who acted in the manner described above should be held personally liable.

Held further – that a plaintiff may not sue for a debt allegedly owed to it by a member based on s64 unless and until (1) the court has determined upon an application filed that the defendant conducted the corporations business in a gross negligent, fraudulent or reckless manner; (2) the court has determined the extent of the defendant's liability i.e. whether the latter should pay all or part of the debts claimed.

ORDER

1. The application for summary judgment against both the 1st defendant and the 2nd defendant is dismissed with costs.
2. The matter is postponed to 29 March 2017 at 15:15 hrs, for a status hearing regarding the future conduct of the matter.
3. The parties are ordered to file a status report at least three (3) days before the hearing referred to in para 2 above stating proposals for the advancement of the matter, particularly in light of this judgment.

JUDGMENT

MASUKU J.:

Introduction and background

[1] This is an opposed application for summary judgment. Briefly stated, the application arises in the following circumstances: The plaintiff, a company duly incorporated in terms of this country's Company Laws with its principal place of business situate at 233 Nickle Street, Prosperita, in Windhoek, on 21 July 2016, obtained a judgment by default against entity known as Kubaraf Development Enterprises CC, (Kubaraf).

[2] The judgment was for payment of an amount of N\$ 521 729.70, interest and costs. It would appear that when the Deputy Sheriff attempted to execute a writ issued by the Registrar of this Court, no realisable property could be found at Kubaraf's premises, the judgment debtor. It is actually alleged that the 1st defendant informed the Deputy Sheriff that Kubaraf had sold all its assets to another entity known as Emro Technical Services. It is averred further that the Deputy Sheriff was denied access to Kubaraf's premises.

[3] The present claim is lodged against the 1st defendant, Mr. Robert Coetzee and Mrs. Emgard Coetzee, who it is alleged are members of Kubaraf. The plaintiff accordingly claims the entire amount stated in para [2] above against both defendants. From a reading of the particulars of claim, it is averred that the suit against them is in terms of s. 64 of the Close Corporations Act,¹ ('the Act'), it being alleged that both defendants carried on the business of the Kubaraf recklessly or with the intent to defraud creditors, in particular, the plaintiff.

[4] The plaintiff accordingly avers that it will apply to the court to declare the defendants cited above personally liable for Kubaraf's debts and liabilities and in respect of which the plaintiff obtained the default judgment as aforestated.

[5] In the prayers sought, the plaintiff applies for judgment against both defendants as follows:

¹ Act No. 26 of 1988.

'a) That in terms of Section 64 of the Close Corporations Act No. 26 of 1988 the court declares First and Second Defendants personally liable for the debts of Kubaraf Enterprises CC, and in particular, for the debt owed by Kubaraf Development Enterprises CC to Plaintiff in the amount of N\$521 729.70 plus interest thereon at the rate of 20% per annum calculated from 30th January 2015 to date of final payment.

b) Judgment against the First and Second Defendants for the said amount of N\$ 521 729.70 together with interest thereon at the rate of 20% per annum calculated from 30 January 2015 to date of payment.'

Bases of opposition – the 2nd defendant

[6] A reading of the defendants' affidavit in opposition suggests that there are two main bases for the opposition. The first is in respect of the 2nd defendant. It is deposed on affidavit that there was no basis in law for the plaintiff to have laid a claim against the 2nd defendant. 2nd defendant, it was deposed on oath, is not, and has never, at any time been a member of Kubaraf. In support of this contention, the 1st defendant attached a true copy of the Amended Founding Statement of Kubaraf. The said document reflects only the 1st defendant as the only member of Kubaraf.

[7] I consider it necessary, at this juncture, to cut the matter to the chase and state that in view of this document, the 2nd defendant has, in my view, put up a viable defence to the plaintiff's claim namely that there is no basis, whatsoever upon which the plaintiff could properly or at all, claim any liability by the 2nd defendant.

[8] I am accordingly of the considered view that the case put up on behalf of the 2nd defendant is unassailable and meets the requirements a defendant should meet in order to defeat a claim for summary judgment, namely, that he or she should raise a defence, which is good in law and *bona fide*.

[9] In my considered view, and for the foregoing reasons, the application for summary judgment against the 2nd defendant, must be dismissed with costs. In this regard, it must be mentioned that it was pointed out to the

plaintiff's legal practitioner on behalf of the 2nd defendant, during the rule 32 (9) and (10) procedure, and before the application for summary judgment was moved, that she was not a member of the Close Corporation. That notwithstanding, the plaintiff persisted in drawing the 2nd defendant into the mire of summary judgment.

[10] In the premises, the 2nd defendant is granted leave to defend the claim against her. Mr. Vaatz had no sustainable or convincing answer to the application for the dismissal of the application for summary judgment against the 2nd plaintiff. He should, in my view, be advised to seriously consider whether, in view of the membership to Kubaraf, as disclosed on affidavit, there is any sustainable claim to be pursued against the 2nd defendant. This serves to place the summary judgment claim against the 2nd defendant at an end, with the plaintiff having a momentous decision to make, as indicated, whether there is need to keep the 2nd defendant yoked to her husband in the further proceedings.

Nature of summary judgment

[11] Summary judgment is provided for in terms of rule 61 of this court's rules. There has been a lot of judicial comment on the nature and effect of summary judgment in this and other courts, including the threshold a defendant has to meet in order to defeat the ensnaring effects of summary judgment.

[12] In the Botswana Court of Appeal judgment of *Economy Investment v First National Bank of Botswana Limited*,² Tebbutt J.A., writing for the majority of that country's apex court, remarked as follows regarding the nature and effect of summary judgment:

'It has been repeated over and over that summary judgment is an extraordinary stringent and drastic remedy in that it closes the door in final fashion to the defendant and permits a judgment to be given without a trial. It is for that reason

² [1996] BLR 828 at 838 B-F.

that in a number of cases in South Africa, it was held that summary judgment would only be granted to a plaintiff who has “an unanswerable case”. In more recent cases that test has been expressed as going too far.

In *Du Setto's* case (*supra*) this Court came to a similar conclusion and I repeated this view in *Fashion Enterprises (Pty) Ltd v Image Botswana (Pty) Ltd [1994] BLR 288 CA*. As set out in *Du Setto's* case, at page 285H; the purpose of summary judgment is well known; it is aimed at a defendant who, although he has no *bona fide* defence to an action brought against him, nevertheless files a notice of defend solely in order to delay the grant of the judgment in favour of the plaintiff. It therefore serves a socially and commercially useful purpose, frustrating an unscrupulous litigant seeking only to delay a just claim against him. However, even though the plaintiff need not have an unanswerable case, it is clear that before a Court will close its door finally to a defendant it must take care to see to it that the plaintiff's claim is unimpeachable. Because of the drastic consequences of an order granting summary judgment the Courts must be astute to ensure that the procedure is not abused by a plaintiff who may wish either to secure, by the procedure, a judgment against a defendant when he knows full well that he would ordinarily not be able to obtain such a judgment without trial, or who may use the procedure as a means of embarking upon a “fishing expedition” to try to ascertain prematurely what a defendant's defence is and to commit him to it on oath.'

[13] The question that follows, considering the foregoing exposition of the law, is whether the 2nd defendant falls in the category of unscrupulous defendants who have no *bona fide* defence to the claim but who has filed his notice to defend for no other purpose than to delay the granting of the inevitable as it were. In order to answer this critical question, regard must of necessity be had to the 1st defendant's affidavit filed in opposition to the summary judgment application. I proceed to do so below.

The 1st defendant's defence

[14] The second basis for opposing the granting of summary judgment, is that advanced by the 1st defendant. The 1st defendant denies that he has filed his notice to defend for the nefarious purpose of unduly delaying the

defendant from enjoying the fruits of its judgment. He specifically denies that he ever traded recklessly or fraudulently as alleged in the particulars of claim. The 1st defendant also denies that he informed the Deputy Sheriff that the property of the Close Corporation had been sold as alleged in the particulars of claim.

[15] He further states that he was involved in a serious motor vehicle accident, which left him hospitalised for a period in the excess of six months. He deposes that during this time, he was unable to attend to the business of the corporation and that everything relating to the business disintegrated so to speak, during the time of his confinement in hospital.

[16] Mr. Ntinda, for the 1st defendant argued that an application for summary judgment is not competent in the present circumstances. He based his contention on the provisions of s.64 (1), which have the following rendering:

'If it at any time appears that any business was or is being carried on recklessly, with gross negligence or with intent to defraud any person or for any fraudulent purpose, a Court may, on the application of the Master, or any creditor, member or liquidator of the corporation, declare that any person who was knowingly a party to the carrying on of the business in any such manner, shall be personally liable for all or any such debts or other liabilities of the corporation as the Court may direct, and the Court may give such further orders as it may consider proper for the purpose of giving effect to the declaration and enforcing that liability.' (Emphasis added).

[17] I need to comment briefly on this provision. Firstly, it is clear that persons who are entitled to bring such an application, include the Master of the High Court, any creditor, member or liquidator of the corporation. On this account, it is in my view clear that the plaintiff, being a creditor, is within its rights to bring such application and is authorised to do so by law.

[18] Second, it is also clear from the above quoted provision that 'any person', as employed by the Legislature in the above section, also refers to a member of the

corporation. This is so for the reason that members are often heavily and sometimes intimately involved the running of the business of the corporation and may, in some circumstances find themselves accused of trading in the manners set out in s.64. In this regard, it is to be noted that the 1st defendant is a member and is amenable, if the court is satisfied, on application, to be a recipient of an order for the invocation of this section in appropriate circumstances.

[19] It is important to mention that in terms of s. 2 (2) and read with s. 2 (3) of the Act, a Close Corporation is granted separate legal or juristic personality from the members who form it. Section 2 (3). For instance, provides that, 'Subject to the provisions of this Act, members of a Corporation, shall not merely by reason off their membership be liable for the liabilities or obligations of the Corporation.'

[20] This separate personality created by the Act, ordinarily does not permit of the members being held personally liable for the debts or liabilities of the Close Corporation. A special mechanism is open to the court, on proper application, to do so. This is, in Company Law parlance normally referred to as the piercing of the corporate veil and this is what s. 64 was designed by the Legislature to achieve.³

[21] From the provisions of s.64, one issue is plain – the liabilities of a close corporation cannot, without more, be imputed onto the members without the fictional piercing of the corporate veil. In this regard, an application should be made to the court for a declaration that such a course should be followed and on stated serious grounds such as fraud, grossly negligent or reckless running of the affairs of the Corporation by the members sought to be held personally liable.

[22] I should pertinently point out that I am of the considered view that the word 'application' employed in the Act should not be regarded as idle or inconsequential. It bears a special meaning. It is unfortunately not defined in

³ Charles Baloyi v J D Malherbe and Another (JR 2661/2007) All SA 20 [2015] (21 January 2015).

the Act and in this event, we need to find the meaning of an application elsewhere.

[23] I am of the considered view that the rules of court do give guidance as to what an application is. They, in my view, should be called in aid for the reason that any such application in terms of the s.64, is to be referred to this court for determination. I say so for the reason that the definition section of the Act states that 'Court – means the High Court of Namibia in terms of Section 7 of the Close Corporations Act 26 of 1988.' It stands to reason therefore, that this court's interpretation of an application as contained in this court's rules should be followed.

[24] According to the definition provisions of the rules of court, application 'means an application on notice of motion as contemplated in Part 8.' Rule 65 (1), found in Part 8, on the other hand, provides the following:

'Every application must be brought on notice of motion supported by affidavit on which the applicant relies for relief and every application initiating new proceedings, not forming part of an existing cause or matter, commences with the issue of the notice of motion signed by the registrar, date stamped with the official stamp and uniquely numbered for identification.'

[25] It follows, from the foregoing, that a party seeking to invoke the provisions of s.64, namely, to seek a declarator that a natural person should be held personally liable for the debts or liabilities of a Close Corporation, he or she should make out a case on application, i.e. on a notice of motion setting out the relief claimed and accompanied by an affidavit or affidavits on which the bases for the invocation of the said section is clearly and succinctly spelt out.

[26] Crucially, it would appear to me, the basis of the application must be those steeped in the epithets set out in s. 64, namely that the said person, or persons, conducted the business of the Close Corporation fraudulently, grossly negligently or recklessly to the detriment of the body of creditors or the

particular creditor. I am of the considered view that the bases for such serious allegations must be contained in the affidavit to enable the party alleged to be the wrongdoer, to answer fully thereto and for the court to ultimately make its decision on the application.

[27] In the premises, I am of the considered view that a party seeking judgment based on the invocation of the provisions of s.64 must have first sought and obtained a declarator from the court that the member concerned knowingly traded in one or more of the manners set out in s. 64.

[28] In the light of the foregoing conclusion, I am of the considered view that the application for summary judgment in this case is premature and precipitate. In the absence of a favourable order in which the court will make a determination in favour of the creditor or other person mentioned in the section, that the member(s) traded recklessly, fraudulently or with gross negligence, I am of the firm view that a creditor may not apply for judgment before overcoming that hurdle.

[29] Where a creditor moves a summary judgment application for payment of the amount which is the one that was sought to be claimed against the close corporation, but before a favourable declaration in terms of s. 64 is made by the court, it would appear to me that the said creditor is guilty of putting the cart before the horse. There must first be an application for the lifting of the corporate veil, so to speak and this application should clearly and succinctly spell out the reasons why it is claimed that the said person or persons carried on the business of the said corporation in the manner set out in s. 64 of the Act and that would justify the court, in deserving cases, imputing the debts or liabilities of the corporation on the members.

[30] What is more, it appears to me that the plaintiff in this case has not only not sought a declarator from the court as set out in the said section, it has not even stated the grounds upon which it is contended that the 1st defendant knowingly traded recklessly, grossly negligently or fraudulently. The wrongdoing alleged on the part of the debtor must not just be a parochial

conclusion of the party making the assertion but there must be clear and concise allegations on oath that will be buttressed by evidence of some sort or the other, to enable the court to make the appropriate determination on the application.

[31] In my considered view, it is only after such a declarator by the court has been made in the plaintiff's favour that the latter could, armed with the positive finding of reckless, grossly negligent or fraudulent trading, that it can move for summary judgment. I am of the considered view therefore, that the plaintiff's claim, as it presently stands is impeachable in the circumstances and this is a sound reason not to grant summary judgment in this matter.

[32] There is a further reason in my view, why the declarator is first to be obtained before one moves for summary judgment. This is to be found in s.64 itself, where the Lawgiver gives the court some discretion regarding the amount to be paid by the erring member after the lifting of the corporate veil. This will obviously depend on the evidence adduced as to whether to grant an order for the entire amount claimed or some other amount or portion which may be proved to the court's satisfaction. It is, in my opinion, for that reason that the section speaks of the member being liable 'for all or any such debts or liabilities of the corporation as the court may direct. . .' (Emphasis added).

[33] I am accordingly of the firm view that a creditor may not properly move an application for summary judgment without having first moved the application contemplated in s.64 of the Act and the court having found in favour of the plaintiff that the said member knowingly traded recklessly, grossly negligently or fraudulently, as the case may be. More importantly, the court must have determined the amount to be claimed from the said member and it is on that amount that a plaintiff may properly sue and, where appropriate, apply for summary judgment.

[34] In any event, even if the issue of the declarator is not placed into focus, it is clear that the version of the 1st defendant deposed to on oath, raises issues that are destructive of the allegations made in the particulars of claim.

In particular, the 1st defendant denies the correctness of the version imputed to the Deputy Sheriff concerned in the particulars of claim and deposes to allegations controverting the correctness of the plaintiff's version. There is thus a dispute raised by the 1st defendant's affidavit regarding the execution process and the events surrounding same.

[35] Equally worthy of consideration is the 1st defendant's version that he was involved in a serious motor vehicle accident and was consequently hospitalised for a lengthy period of time. He contends that it was at this time that the business of the corporation went moribund and this, rather than the suggestion of recklessness, gross negligence or fraud, may serve to explain the failure of the business concerned. In terms of s.64, the person sought to be declared liable for the debts must 'knowingly' be a party to the negligence, fraud or gross negligence alleged.

[36] In this regard, a person, who was hospitalised due to a motor vehicle accident, as the 1st defendant claims on oath, can hardly be said to have acted 'knowingly' within the meaning of the word. It is for that reason that the enquiry into the application of s.64 must first be conducted as the defendant's version raises a triable issue within the meaning of the principles applicable to summary judgment regarding whether the provisions of s.64 should apply to him.

[37] The foregoing, in my considered view, constitute a reasonable basis upon which the court can find and properly hold that the defendant has not filed its notice to defend for the mere purpose of delaying the plaintiff enjoying the fruits of its judgment early. In my view, the 1st defendant has met the threshold set out in case law for him to be granted leave to defend the action.

[38] It is my considered view that were the court persuaded to grant summary judgment in the present circumstances, and on the papers as they stand at present, an injustice to the 1st defendant may well be perpetrated, leaving a bad aftertaste in the court's palate.

Conclusion

[39] I am accordingly of the view that the 1st defendant's case is also a condign one in which to refuse the grant of summary judgment. In the premises, I grant the following order:

1. The application for summary judgment against both the 1st defendant and the 2nd defendant is dismissed with costs.
2. The matter is postponed to 29 March 2017 at 15:15 hours, for a status hearing regarding the future conduct of the matter.
3. The parties are ordered to file, preferably, a joint status report, at least three (3) days before the hearing referred to in para 2 above, stating concrete proposals for the advancement of the matter, particularly in light of this judgment.

T.S. Masuku
Judge

APPEARANCES:

PLAINTIFF:

A Vaatz

Instructed by:

Andreas Vaatz & Partners

DEFENDANT:

M Ntinda

Instructed by:

Sisa Namandje & Co. Inc.