



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 1881/2016

In the matter between:

NICOLAAS GUSTAV ANGERMUND

PLAINTIFF

and

GARETH RAY McNAB

FIRST DEFENDANT

DAVID MBAKO KARINGOMBE

SECOND DEFENDANT

Neutral citation: *Angermund v McNab* (I 1881/2016)[2019] NAHCMD 242 (16 July 2019)

Coram: PARKER AJ

Heard: 4, 25, 26 June 2019

Delivered: 16 July 2019

Flynote: Close corporation – Personal liability for debt of close corporation under s 64 (1) of Close Corporation Act 26 of 1988 – defends sued in their personal capacity for debts of close corporation in terms of s 64 (1) – On the papers court finding that plaintiff not entitled to institute such action proceedings – Plaintiff not master of the High Court, a member of the CC, a liquidator of CC, or a creditor since judgment by default granted in plaintiff's favour was wrong – Plaintiff's reliance on

Resolution of the CC as a contract upon which plaintiff could sue misplaced – Consequently, plaintiff's claim dismissed.

Summary: Close corporation – Personal liability for debt of close corporation under s 64 (1) of Close Corporation Act 26 of 1988 – defendants sued in their personal capacity for debts of close corporation in terms of s 64 (1) – Plaintiff no longer member of CC when he instituted the action proceedings – Plaintiff relied on Resolution of CC made by the parties when still a member of CC – Resolution provided for distribution of profits from a certain project among plaintiff and defendants even after plaintiff has ceased to be member of CC – Resolution provided further that the members of the CC would enter into a shareholders' (ie members') agreement that would govern relationship among shareholders – no such agreement was ever entered into – Court held that Resolution not a contract within the meaning of rule 45 (7) of rules of court – Consequently plaintiff could not sue on a non-existent contract – It is upon the Resolution passing as a contract that plaintiff relied on to obtain judgment by default against CC – Court finding that inasmuch as plaintiff obtained judgment on basis of non-existent contract that judgment is wrong – In that regard plaintiff not a creditor within meaning of s 64 (1) of Act 26 of 1988 - Consequently. That section not available to plaintiff to sue the members (defendants) in their personal capacity – In the result plaintiff claim dismissed with costs.

ORDER

- (a) It is confirmed that plaintiff withdrew the action against first defendant.
 - (b) Judgment for second defendant.
 - (c) Plaintiff's claim is dismissed with costs
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JUDGMENT

PARKER AJ

[1] In order to appreciate the essence of this matter (Case No. I1881/2016) in the instant proceedings, we should look at Case No. I2532/2014. In Case No. I2532/2014 plaintiff obtained judgment by default against defendants in the following terms:

'Having heard Mr Van Wyk, counsel for the plaintiff and having regard to the documents filed of record:

IT IS ORDERED THAT:

1. Payment of the amount of N\$1 433 333.33.
2. Interest on the amount of N\$1 433 333.33 at the rate of 20% per annum a tempore morae to run with effect from 10 May 2014 to date of final payment.
3. Cost of suit.'

[2] Plaintiff proceeded to execute the judgment by default in Case No. I2532/2014 by a writ of execution issued on 12 November 2015. The judgment by default order was granted on 13 August 2015. The parties in case No. I2532/2014 are Nicolaas Gustav Angermund as plaintiff, and Amswohl & LGA Construction Joint Venture CC ('the Joint Venture CC') as defendant. At the relevant time the members of the Joint Venture CC were David Mbako-Karingombe (second defendant in the present proceedings – Percentage of interest 33.34 percent), Nicolaas Gustav Angermund (plaintiff in the present proceedings – Percentage of interest – 33.33 per cent), and Gareth Ray McNab (first defendant in the present proceedings – Percentage of interest – 33.33 percent.) This close corporation was registered on 8 October 2007. Angermund (Plaintiff) ceased to be a member of the CC on 2 December 2009, leaving only first and second defendants as the members, each holding 50 per cent percentage interest. The relevance of this factual finding will become apparent shortly. In the instant proceedings plaintiff decided to withdraw the action against first defendant.

[3] The plaintiff's claim in Case No. I 2532/2014 was said to be based on a written contract; and, in terms of rule 45 (7) of the rules of court, plaintiff annexed to

his pleading a copy of what he characterized as a written contract on which he relied for relief:

**'AMSWOHL & LGA CONSTRUCTION JOINTVENTURE CLOSE CORPORATION
RESOLUTIONS OF THE MEMBERS OF AMSWOHL & LGA CONSTRUCTION
JOUNTVENTRUE CLOSE CORPORATION TAKEN AT THE MEETING HELD ON THE
16TH OF OCTOBER 2009, AT NO.5 GOLD STREET, PROSPERITA, WINDHOEK**

THE MEMBERS

: RESOLVED-

THAT the shareholding in AMSWOHL & LGA CONSTRUCTION JOINTVENTURE CC be diluted with exclusion of Mr. Nocolas Gustav Angermund, who expressed his desire to relinquish his shareholding in the joint venture.

: RESOLVED-

That Mr. Nicolaas Gustav Angermund will be part of the Oranjemund Haulage contract, and any or other contracts that the JV might secure with Namdeb in future, for beneficiation on a project profit sharing basis.

: RESOLVED-

THAT the share distribution be as follow:

Mr. Gareth Ray McNab	50%
Mr. David Mbako-Karingome	50%

: RESOLVED-

THAT the shareholders will enter into a shareholders' agreement that will govern the relationship among the shareholders.

We, the undersigned shareholders hereby confirm that the resolutions as set out above are true and correct in every respect.

[signature].....

GARETH RAY MCNAB

21 October 2009

DATE

[signature].....

DAVID MBAKO-KARINGOMBE

21 October 2009

DATE

[signature].....

NICOLAAS GUSTAV ANGERMUND

21 October 2009

DATE'

[4] Plaintiff's reliance on the Resolution passed on 21 October 2009 as the contract he sued on is misplaced at law. The Resolution cannot by any legal imagination be a contract. It was never the intention of those whose signature appears at the bottom of Resolution to be a contract. They signed the document in order to 'confirm that the resolutions as set out above are true and correct on every respect'.

[5] A resolution of a body made by its members at a meeting is the decision of the members who attended the meeting. Indeed that the Resolution, which plaintiff is so much enamoured with, is not an agreement in any shape or hue is undoubtedly found in these words in the fourth resolution.

RESOLVED-

'**THAT** the shareholders will enter into a shareholders' agreement that will govern the relationship among the shareholders.'

[6] The 'relationship among the shareholders' is that which the 'shareholders' resolved (ie decided) in the first, second and third resolutions. The conclusion is, therefore inescapable that there is no contract, properly so called, within the

meaning of rule 45 (7) of the rules of court. The result is that there is no contract upon which plaintiff could have relied under Case No. I2532/2014 in order to obtain the judgment by default. The decision to grant judgment by default is, therefore, wrong; and so, upon the authorities, this court is not bound to accept or follow it. See *Chombo v Minister of Safety and Security (I3883/2013)* [2018] NAHCMD 37(20 February 2018), paras 57-69 where the court rejected counsel's argument that in the instant proceedings there, the court should accept two previous decisions of the court on the points then under consideration.

[7] Accordingly, I respectfully reject the court's decision to grant judgment by default in Case No. I2532/2014 upon which plaintiff has instituted the present proceedings against the present defendants. With the rejection of that decision, the whole case of plaintiff in the instant proceedings has no legal basis: It crumbles. Plaintiff must, accordingly, fail in his claim against defendants in the instant proceedings inasmuch as the claim is based on a judgment by default, which, in turn, relied on a non-existent contract. To decide otherwise is to perpetuate an illegality that arises from an issue of law.

[8] The plaintiff's claim should be rejected on another ground in terms of the Close Corporation Act 28 of 1988. Plaintiff instituted the present proceeding because the judgment by default could not be satisfied, there being no assets of the CC to realize in satisfaction of the debt. It is for that reason that plaintiff pursued first and second defendants in each one's personal capacity in the present matter. In essence, as a matter of law, one cannot separate Case No. I2532/2014 and the instant matter. It is Case No. I2532/2014 which gave rise to the instant proceeding; and it is through the instant proceeding that plaintiff has pursued the members in their personal capacity in order to obtain satisfaction for the judgment by default granted in Case No. I2532/2014, as I have said more than once.

[9] The summons, as I have stated previously, issued out of the Registrar's office on 10 June 2016. At that relevant time plaintiff had long ceased to be a member of the CC. In his amended particulars of claim, plaintiff avers that the business of the CC was carried on: (a) with intent to defraud creditors of the CC or recklessly. And for this, plaintiff says first and second defendants 'are jointly and severally liable

towards plaintiff' in terms of the Close Corporation Act 28 of 1988. The relief sought in the instant proceedings are similar to the relief sought and obtained in Case No. I2532/2014; except that in the earlier case the CC is the defendant, while in the instant proceedings the members of the CC are the defendants.

[10] In terms of s 64 of Act 26 of 1988, which is entitled '**Liability for reckless or fraudulent carrying on of a business of corporation**' –

'(1) If it at any time appears that any business of a corporation 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 of such debts or other liabilities of the corporation as the Court may direct, and the Court may give such further orders as it considers proper for the purpose of giving effect to the declaration and enforcing that liability.'

[11] It is clear from s 64(1) of Act 26 of 1988 that a person who may bring any application to implement s 64 (1) of the Act are (a) the Master of the High Court, (b) any creditor, (c) a member of the CC, or (d) a liquidator of the CC. Plaintiff is not the Master of the High Court; he is not a liquidator of the CC. He is not a creditor, since I have held that the decision granting the judgment by default is wrong. He is also not a member of the CC; and he, therefore, has *no locus standi in judicio* to institute proceedings for any alleged carrying on of business of the CC recklessly, with gross negligence or with intent to defraud any person or for any fraudulent purpose in terms of Act 28 of 1988.

[12] For these reasons also, plaintiff's claim should fail; and it fails, and is rejected.

[13] The conclusions I have reached are unaffected by plaintiff's decision to withdraw the action against first defendant, which the court confirms.

[14] In the result, I make the following order:

(a) It is confirmed that plaintiff withdrew the action against first defendant.

- (b) Judgment for second defendant.
- (c) Plaintiff's claim is dismissed with costs.

C PARKER
Acting Judge

APPEARANCES:

PLAINTIFF:

JC Van Wyk

Of JC Van Wyk Attorneys, Windhoek.

SECOND DEFENDANT:

K Kamuhanga

Of AngulaCo Incorporated, Windhoek