

REPUBLIC OF SOUTH AFRICA



SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 2009/41058

In the matter between -

THE SOUTH AFRICAN BANK OF ATHENS LIMITED

Plaintiff

and

SALVADORA PROPERTIES NINETY NINE CC

Defendant

(Registration Number: 2004/013002/23)

J U D G M E N T

BORUCHOWITZ, J:

[1] This is an application for the winding up of the respondent close corporation on the grounds of its inability to pay its debts as envisaged by section 68(c) as read with section 69(1)(a) of the Close Corporations Act 69 of 1984 (the Act).

[2] The applicant is a bank. Its claim against the respondent arises from a deed of suretyship in terms of which the respondent purported to bind itself as surety and co-principal debtor in favour of the applicant for the due payment by JAV Opencast Mining CC (JAV) of all amounts which it then or in the future owed to the applicant from whatsoever cause arising. JAV, the principal debtor, is said to be indebted to the applicant in an aggregate amount of R4

701 683,88 arising from certain instalment sale agreements entered into with the applicant.

[3] The respondent challenges the validity of the deed of suretyship and consequently the debt relied on by the applicant. It is common cause that the deed of suretyship was signed by a Mr Jacobus Arnoldus Viviers (Viviers) on 2 July 2008 in his capacity as a member of the respondent. Viviers, who deposes to the respondent's answering affidavit, states that the entire member's interest of the respondent is held by an *inter vivos* trust known as the JAV Familie Trust (the trust) of which he is one of three trustees, the others being Mrs Catharina Petronella Viviers and a Mr Petrus Johannes Botes. He further states that in terms of the relevant trust deed, the consent of the majority of the trustees was required in order to bind the respondent and that his fellow trustees did not authorise him to enter into the deed of suretyship. His reluctance to sign the deed was in fact conveyed to a representative of the applicant who assured him that he need not worry and that there would be no problems if he appended his signature thereto.

[4] The respondent relies on the well-established common law principle that trustees must act jointly, unless the trust deed provides otherwise, in order to bind the trust (See *Nieuwoudt NO v Vrystaat Mielies (Edms) Bpk* 2004 (3) SA 486 (SCA) at para [16]; *Land and Agricultural Development Bank of SA v Parker* 2005 (2) SA 77 (SCA) at paras [11] and [15]). But these cases cannot avail the applicant. The legal position in the present matter is not governed by the common law but by the provisions of the Act. When executing the deed of suretyship, Viviers did not act on behalf of the trust but

as the holder of the entire member's interest in the respondent. In terms of a certificate issued by the Registrar of Close Corporations, Viviers is reflected as the holder of 100% of the member's interest in the respondent, in his capacity as the representative trustee of the trust. The member's interest is described in the certificate as being held by "*Viviers, Jacobus Arnoldus as a trustee of JAV Familie: jointly: CP Viviers PJ Botes*".

[5] The requirements for the holding of membership in a close corporation are set out in section 29 of the Act. The relevant portions thereof, for present purposes, read as follows:

"29. Requirements for membership.– (1) Subject to subsection (1A) or (2)(b) and (c), only natural persons may be members of a corporation and no juristic person or trustee of a trust *inter vivos* in that capacity shall directly or indirectly (whether through the instrumentality of a nominee or otherwise) hold a member's interest in a corporation.

(1A) A natural or juristic person in the capacity of a trustee of a trust *inter vivos* may be a member of a corporation: Provided that –

- (a) no juristic person shall directly or indirectly be a beneficiary of that trust;
- (b) the member concerned shall, as between himself or herself and the corporation, personally have all the obligations and rights of a member;
- (c) the corporation shall not be obliged to observe or have any obligation in respect of any provision of or affecting the trust or any agreement between the trust and the member concerned of the corporation; and
- (d) if at any time the number of natural persons at that time entitled to receive any benefit from the trust shall, when added to the number of members of the corporation at that time, exceed 10, the provisions of, and exemption under, this subsection shall cease to apply and shall not again become applicable notwithstanding any diminution in the number of members or beneficiaries.

(2) ...

- (3) ...
- (4) A corporation is not concerned with the execution of any trust in respect of any member's interest in the corporation."

[6] To facilitate a proper understanding of the section, and of a further argument advanced on behalf of the respondent to which I will presently refer, it is necessary to set out the legislative history of the section.

[7] Section 29(1) originally provided as follows:

"Subject to the provisions of sub-section (2)(b) and (c), only natural persons may be members of a corporation and no juristic person shall directly or indirectly (whether through the instrumentality of a nominee or otherwise) hold a member's interest in a corporation."

[8] The exceptions in sections (2)(b) and (c) are trustees of a testamentary trust and representatives of insolvents, deceased estates or mentally disordered or incapable persons.

[9] On 11 January 2006, an amendment was promulgated retroactively to 13 April 1987 which inserted immediately after the words "*no juristic person*", the words "*or trustee of a trust inter vivos in that capacity*". The amendment was introduced by section 3(1) of Act 64 of 1988 and made retroactive to 13 April 1987 in terms of section 3(2).

[10] Section 29(1A) was introduced by section 1 of Act 17 of 1990 and provided that section 29(1) was not to apply to membership of a corporation of a natural person who held that membership for the benefit of a trust *inter*

vivos if immediately before 13 April 1987 a natural person held membership of a corporation for the benefit of the trust and subject to the limitations that are presently found in section 29(1A).

[11] Thus from 1990 until the amendment by Act 25 of 2005, the position was that there was a prohibition, introduced with effect from 13 April 1987, against a trustee of a trust *inter vivos* in that capacity holding a member's interest in a corporation. Section 29(1A) provided for an exception for natural persons who held for the benefit of a trust prior to 13 April 1987 when the prohibition was introduced.

[12] Section 2 of Act 25 of 2005 amended section 29(1) by making it subject also to sub-section (1A). The amendment further amended sub-section (1A) by permitting a trustee of a trust *inter vivos* to be a member of the corporation subject to the limitations in paragraphs (a) to (d) of that sub-section. The limited exception for members holding before 13 April 1987 was done away with and trustees of a trust *inter vivos* were generally permitted to be members of the corporation subject to the limitations referred to above. The two relevant limitations are those in sub-paragraphs (b) and (c) above.

[13] Section 29(1) presently provides that subject to sub-section (1A), no trustee of a trust *inter vivos* shall hold a member's interest. Sub-section (1A) provides that a person in such capacity may be a member provided certain requirements are met and adhered to. These are that the member personally has all the rights and obligations of a member between himself and the corporation (section 29(1A)(b)) and further that the corporation is not obliged

to observe or have any obligation in respect of any provision of or affecting the trust or any agreement between the trust and the member of the close corporation (section 29(1A)(c)).

[14] Following the promulgation of Act 25 of 2005 the Registrar of Close Corporations issued a practice note (Cipro practice note No. 1 of 2006) which lays down certain procedures that are to be followed when the trustee of a trust *inter vivos* wishes to acquire a member's interest in a close corporation. It provides, among other things, that in the case of multiple trustees, an originally signed special power of attorney by each of the trustees appointing one of them as the representative of the trustees for purposes of holding and dealing with the member's interest in the close corporation concerned must also be lodged with the form CK2 or CK2A, as the case may be. A letter by the trustee, or in the case of multiple trustees, the representative trustee must be furnished giving among other things the name, registration number and address of the trust as well as the names of all the trustees of the trust. As is evident from the certificate issued by the Registrar of Close Corporations in respect of the respondent these details were provided to the Registrar when Viviers was appointed the representative trustee holding the member's interest in the respondent.

[15] As a matter of law, the respondent's assertion that the trust is the holder of the member's interest in the respondent is incorrect. That interest is held by Viviers in his capacity as the authorised representative trustee. Section 1 of the Act defines a member as a person qualified for membership of a corporation in terms of section 29, including "*a trustee*" or other legal

representative. That definition envisages membership of the person representing the trust and not the trust itself.

[16] As the designated holder of the entire member's interest in the respondent, Viviers would have had lawful authority to represent the respondent when contracting with third parties and in executing the suretyship on the respondent's behalf.

[17] In a final attempt to demonstrate that Viviers lacked the requisite authority, respondent's counsel, in an ingenious argument, sought to rely on the wording of section 29(1A)(c) of the Act, which provides as follows:

"the corporation shall not be obliged to observe or have any obligation in respect of any provision of or affecting the trust or any agreement between the trust and the member concerned of the corporation; and ..." [Underlining my emphasis]

[18] He submitted that sub-section 29(1A)(c) of the Act does not prohibit a close corporation from observing or having an obligation under a trust deed. He argued that the ordinary literal and grammatical meaning of the words used in the sub-section, and especially the phrase underlined above, is that the corporation may choose to observe or have an obligation in respect of any provision of the trust deed, but it is not necessarily obliged to do so. He further submitted that on the facts, Viviers had explicitly, or at least implicitly, chosen on behalf of the respondent to observe the provisions of the trust deed at the time of signing the suretyship by alerting the applicant's representative to the fact that he was acting without the authority of the trust. In consequence, it was open to the respondent to contend that Viviers was not

authorised to bind it as a surety in favour of the applicant without the consent of the majority of the trustees.

[19] The construction attributed by the respondent to sub-section 29(1A)(c) is, in my view, untenable. To interpret it in that manner would run counter to a principal objective of section 29(1A), which is to ensure that the corporation concerns itself only with the holder of the member's interest and not with the beneficial holder of such interest. This is evident from the wording of sub-section 29(4) which provides that a corporation is "*not concerned with the execution of any trust in respect of any member's interest in the corporation*" (see the discussion concerning the effect of this sub-section in *Guide to the Close Corporations Act and Regulations*, Geach & Schoeman at 534; *Henochsberg on the Close Corporations Act* (Vol 3) Meskin at Com-70).

[19] The fiduciary capacity in which the member becomes a member is something which has nothing to do with the close corporation. The primary fiduciary relationship which is owed is owed by the member personally to the close corporation. This is apparent from the wording of sub-section 29(1A)(b).

[20] The use of the word "*shall*" (as opposed to "*may*") is a general indication that sub-section 29(1A)(c) was intended to be peremptory and not permissive in nature. The ordinary meaning of the word "*obliged*" is "*legally liable*" or "*to be forced or compelled to do so*" (see *Anglo African Shipping Co (1936) Ltd v Harris* 1977 (2) SA 213 at 216). And the ordinary meaning of the word "observe" is to "*fulfil*" or "*comply with*".

[21] Simply put, and having regard to the foregoing considerations, the phrase “*shall not be obliged to observe or have any obligation*” means, in my view, that a close corporation shall not be legally liable to fulfil or comply with any obligation that a representative member of a trust might have in terms of an underlying trust deed. Accordingly, any transaction in which the close corporation voluntarily undertakes to observe the provisions of a trust deed would be contrary to the provisions of sub-section 29(1A)(c) and void. Where this occurs the member concerned can no longer be said to satisfy the requirements of sub-sections (b) and (c) of section 29(1A), and the membership of such trustee would be rendered invalid.

[22] For these reasons there is no merit in the respondent’s contention that Viviers acted without the requisite authority when executing the deed of suretyship in favour of the appellant. In any event, and even assuming the correctness of the respondent’s contentions, there is nothing in the affidavits to suggest that the respondent in fact elected to observe or comply with the provisions of the trust deed or assumed any obligation thereunder.

[23] The application was also resisted on the ground that the respondent was not insolvent and able to pay its debts, including the debt owed to the applicant. That indebtedness is substantial, amounting in aggregate to some R4,7 million. Notwithstanding delivery of a demand envisaged in section 69(1)(a) of the Act, on 23 August 2009 the respondent has failed to pay the sum claimed or to secure or compound for it to the reasonable satisfaction of the applicant. It is thus deemed to be unable to pay its debts. Apart from bald and unsubstantiated allegations, no attempt has been made to rebut the

presumption or to show that the respondent has the financial means to satisfy the applicant's claim.

[24] The respondent therefore falls to be placed under winding-up in terms of section 68(c) of the Act.

[25] The following order is granted:

1. The respondent is placed under final winding-up in the hands of the Master of the High Court.

2. The costs of the application are to be in the winding-up of the respondent.

**P BORUCHOWITZ
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG**

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DATE OF JUDGMENT	7 MAY 2010