IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 45064/2018

1. Reportable: ~~Yes~~/ No
2. Of interest to other judges: ~~Yes~~/ No
3. Revised: Yes/ ~~No~~, on date reflected below

26 March 2020

(Signature)

In the matter between:

KENMORE EQUIPMENT CC	**Applicant**
and	
BARNARD, MARIUS CARL	**First Respondent**
BARNARD, MARIA ELIZABETH	**Second Respondent**
Heard on:	**3 March 2020**
Delivered on:	**26 March 2020**

JUDGMENT

WESLEY AJ:

[1] In this application, the applicant seeks to have made an order of court an award made by Mr JH Booyse, a referee, that Barnard Industrial Structural and Mechanical CC ("the CC") is liable to pay to the applicant the amounts of R501 335.72 and US$46 154.56, and also an order declaring that the first and second respondents, who are alleged to be the members of the CC, are personally liable to pay the amount set out in the award, on the basis of the provisions of ss64 and 65 of the Close Corporations Act 69 of 1984 ("the Close Corporations Act").

THE BACKGROUND TO THE APPLICATION

The agreement between the applicant and the CC

[2] The applicant is a supplier and installer of new and used equipment, primarily in the mining and industrial industries. During March 2016 the applicant secured a contract with a German company, Graphit Kropfumul GmbH ("GK"), which operated a mine in Mozambique, to supply and install two silos at the mine. The applicant decided to make use of a sub-contractor to design, manufacture and erect the silos.

[3] On 23 March 2016, the applicant received a quote signed by the first respondent purportedly on behalf of the CC for the work the applicant wished to sub-contract. In April 2016 the applicant accepted the quote and issued a purchase order to the CC, in consequence of which work was carried out and three interim invoices were issued, which were all paid by the applicant during 2016. Each invoice was headed "*M Barnard t/a Barnard Industrial: Structural and Mechanical CC*".

[4] The applicant submitted the invoices to SARS in order to reclaim the VAT charged on the invoices as input VAT. On 27 January 2017 SARS rejected the claim, the reason given being that the invoices were "*invalid tax invoices*".

[5] The applicant then addressed an email to the first respondent requesting that the invoices be amended to meet SARS' requirements for a valid tax invoice. The applicant also conducted its own investigations and discovered not only that the VAT registration number and CC registration number appearing on the invoices did not belong to the CC but also that the CC had been deregistered in July 2002 (There is a dispute as to when the first and second respondents became aware of this latter fact, but as I explain below it is not necessary for me to resolve this dispute for purposes of this judgment).

[6] The first respondent and a representative of the applicant then met to discuss the issue on 23 March 2017. The applicant does not say what took place at the meeting, but on the following day, the first respondent issued a new invoice to the applicant for the aggregate amount of the previous three interim invoices. This invoice was issued under the name "*Barnard Industrial*" and now bore on it a company registration

number and a different VAT registration number (the applicant subsequently ascertained that this VAT registration number and company registration number belonged to a firm called "*Barnard Industrial Profiling and Forming (Pty) Ltd*", of which the first respondent, but not the second respondent, was a director). The applicant then re-submitted its VAT return and was able to claim the relevant input tax deduction.

The dispute referred to the referee

[7] At some point thereafter during 2017 GK complained to the applicant that the design of the silos was defective and threatened to cancel its entire contract with the applicant unless the applicant resolved the issue. The applicant did so, at its own cost, but then sought to recover the costs of doing so from the CC. The first respondent disputed that the CC bore any liability for these costs.

[8] On 20 December 2017, an agreement was then concluded between the applicant and the CC to present the applicant's claims to a referee. The referee was empowered to determine the issues referred to him, which were set out in an annexure to the agreement, to grant relief pursuant to the determination of those issues and to deliver an award setting out that relief. The agreement is not signed on behalf of the CC but there is no dispute that the first respondent agreed to its terms on behalf of the CC. Neither the applicant nor the respondents have explained why the parties entered into an agreement with the CC as one of the parties when they all knew that the CC was deregistered.

[9] On 12 September 2018 the referee issued a ruling in the form of a cost scheduling allocation. He found that the CC was liable to pay to the applicant the amount of R501 335.72 and also the amount of US$46 154.56.

[10] It is payment of these amounts that the applicant now seeks to have enforced against the first and second respondents.

THE GROUNDS FOR AN ORDER IN TERMS OF SECTIONS 64 AND 65 OF THE CLOSE CORPORATIONS ACT

[11] The applicant seeks an order declaring that the CC is not to be regarded as a close corporation but as a venture of the respondents personally in respect of the obligations arising out of the referee's award. This relief is sought in terms of ss64(1) and 65 of the Close Corporations Act.

[11.1] Section 64(1) of the Close Corporations Act provides in relevant part that "*If it at any time appears that any business of a corporation was or is being carried on recklessly … a Court may on the application of … any creditor … 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*";

[11.2] Section 65 of the Close Corporations Act provides that "*whenever a Court on application by an interested person, or in any proceedings in which a corporation*

is involved, finds that the incorporation of, or any act by or on behalf of, or any use of, that corporation, constitutes a gross abuse of the juristic personality of the corporation as a separate entity, the Court may declare that the corporation is to be deemed not to be a juristic person in respect of such rights, obligations or liabilities of the corporation, or of such member or members thereof, or of such other person or persons, as are specified in the declaration, and the Court may give such further order or orders as it may deem fit in order to give effect to such declaration".

[12] As appears from the provisions of the two sections, both permit a court to impose personal liability on members of close corporations in respect of what would ordinarily be the debts of the close corporation as a distinct juristic personality. The sections permit a court to "*pierce the corporate veil*" so that the members of the close corporation can be held liable for the debts of the close corporation.

[13] Both sections are predicated on the existence of a close corporation whose separate legal personality is being abused by the members. In this matter though, the applicant concedes that at the time it entered into the contract with the CC and at the time it entered into the agreement to refer a dispute to the referee, there was not in fact any close corporation in existence. The CC, with which the applicant purported to reach agreements, was deregistered, and had been deregistered since 2002.

[14] It Is settled law that deregistration puts an end to the existence of a close corporation. Its corporate personality ends in the same way that a natural person ceases to exist on death and any act by such "*close corporation*" is void (see, in the

analogous context of companies, **Miller and Others v Nafcoc Investment Holding Co Ltd and Others** 2010 (6) SA 390 (SCA) at paras 11 – 12, which principles have been confirmed to apply in the case of a close corporation, in **Kadoma Trading 15 (Pty) Ltd v Noble Crest CC** 2013 (3) SA 338 (SCA) at para 10). While it might be possible for such actions to be made effective if the close corporation is subsequently reregistered, it is not in dispute that the CC has not been reregistered.

[15] In this case then, the actions purportedly taken on behalf of the CC were not, in fact, taken on its behalf because the CC was not in existence when those actions are taken, and the agreements purportedly concluded between the applicant and the CC are void. It follows that there was no valid referral to the referee and that there are no actions by the CC for which the first and second respondents, as the members of the CC, could be held personally liable as envisaged in ss64 and 65 of the Close Corporations Act. This conclusion holds whether or not the first and second respondents were aware that the CC was deregistered at the time they contracted with the applicant, and in the circumstances it is not necessary to determine the dispute between the parties on this issue any further.

[16] The applicant did not seek to have the first and second respondents substituted as the contracting party on any other basis, and so in the circumstances it is not strictly necessary for me to consider any further the statements by this Court in **Akromed Products (Pty) Ltd v Suliman** 1994 (1) SA 673 (T) at 675–676 that this would be impermissible for the simple reason that to replace the CC as the contracting party with its members would be to create a new contract not contemplated by the parties when they reached agreement. Insofar as the applicant criticised this finding though,

on the basis that it would not protect innocent third parties from deliberate misrepresentations made by members of close corporations, this does not appear to be correct. If, as contended by the applicant, the first and second respondents acted deliberately with knowledge that the CC was deregistered at the time they purported to represent it, in the ordinary course they would be liable in delict for any damage caused by that misrepresentation (see, for example, **Indrieri v Du Preez** 1989 (2) SA 721 (C) at 726I–728H). This was not the cause of action relied on by the applicant though.

CONCLUSION

[17] The agreement between the CC and the applicant to refer a dispute to a referee is void and the award made by the referee therefore cannot be made an order of court. In the circumstances, it is not necessary for me to consider the first and second respondents' further contention that the award cannot be made an order of court because it is also not final.

[18] There is also no basis generally on which to hold the first and second respondents personally liable under ss64 and 65 of the Close Corporations Act for the amounts determined by the referee as being owed by the CC to the applicant arising from the underlying agreement concluded between the applicant and the CC. The actions of the first and second respondents in carrying out that agreement cannot be considered to be actions taken on behalf of the CC as contemplated in ss64 and 64 of the Close Corporations Act because the CC was not in existence at the time the first and second

respondents purported to act on its behalf and the agreement between the CC and the applicant is void.

[19] For these reasons, the application must be dismissed.

[20] As to costs, neither the applicant nor the respondents suggested that there was any reason why costs should not follow the result. The first and second respondents represented themselves, however, and in the circumstances are only entitled to recover the necessary disbursements made by them (see **Grootboom v National Prosecuting Authority and Another** 2014 (2) SA 68 (CC) at paras 47 and 48)

[21] I make the following order:

1. The application is dismissed;
2. The applicant is ordered to pay the necessary disbursements of the first and second respondents.

MA WESLEY
Acting Judge of High Court
Gauteng Local Division, Johannesburg

Appearances:

Counsel on behalf of the Appellant:	JG Botha
Instructed by:	Yammond Hammond Inc
On behalf of the respondents:	In person