

## REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA  
(GAUTENG DIVISION, PRETORIA)

CASE NO: 68585/2013

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
3 June 2014	<i>EMM b-sha</i>
DATE	SIGNATURE

3/6/2014

In the matter between:

ALIDA MAGDALENA STROEBEL  
MARLO STROEBELFIRST APPLICANT  
SECOND APPLICANT

and

MOOIRIVER MALL (PTY) LTD

RESPONDENT

## J U D G M E N T – L E A V E T O A P P E A L

KUBUSHI, J

- [1] The applicants in this matter seek leave to appeal against the whole judgment delivered on 18 February 2014 in terms of which summary judgment under case number 68585/2013 was granted against them.

- [2] The applicants also seek an order that leave be granted to a full bench of the High Court of the Gauteng Division, Pretoria and further that the costs of this application be costs in the appeal.
- [3] The appeal emanates from an opposed summary judgment application wherein I granted summary judgment in favour of the respondent and refused the applicants leave to defend the matter. The Respondent was claiming summary judgment for payment of a debt against the members of Redwood Falls Trading 127 CC trading as Juicy Lucy CC (the CC). According to the respondent the CC was finally deregistered on 15 July 2011. The debt due arose from a rental agreement between the respondent and the CC and the respondent is holding the applicants liable for the debt on the ground that they were the members of the CC at the time the CC was so deregistered. On the contrary the applicants were opposing the application on the basis that there was an appeal pending against the judgment granted against the CC in the magistrates' court and that the CC was not deregistered but under liquidation.
- [4] In their application for leave to appeal, the applicants raised the following factual and legal grounds:

- 4.1 The failure by the court below to consider, alternatively to properly consider the fact that the applicants contended that the basis for the respondent's claim represents the alleged contract between the respondent and the CC. The validity of this alleged agreement is in dispute and in the absence of a binding agreement no liability can be attributed to the applicants.
- 4.2 The failure by the court below to consider, alternatively to properly consider the fact that the status of the CC needs to be determined as of fact. The CC cannot be deregistered under circumstances where the CC is in liquidation. The liability of the applicants remains in question under circumstances where the CC is in liquidation and not in a state of deregistration.
- 4.3 The failure by the court below not to consider, alternatively properly consider the fact that the applicants do not need to prove the defences raised but only that the defences are indeed bona fide and that the defences will represent defences to the claim of the respondent, if proven at the trial.

- [5] The reasons for my judgment were specifically based on the last ground raised by the applicants even though it also incorporated the two other grounds. I concluded in my judgment that I was not satisfied that the applicants have not fully disclosed the nature of the grounds of their defence on the basis that there was no evidence before me that the appeal on which they relied for their defence will be prosecuted. The striking of the appeal from the roll has the effect of discontinuing the appeal and as such the judgment against the CC is not suspended.
- [6] I concluded also that there was no evidence that the CC was under liquidation as suggested by the applicants on the basis that no evidence was tendered by the applicants to that effect nor was there any sort of confirmation from the liquidator that indeed the CC was under liquidation or that the applicants have approached the liquidator to handle the appeal.
- [7] The contention by the applicants' counsel, is that the status of the CC requires determination before it could be concluded that the applicants are liable for the liabilities of the CC. Counsel's argument is that the applicants were not expected at this stage of the proceedings to prove their defence, they merely had to state a case which will represent defences to the claim of the respondent if proven at the trial and as such the applicants should be given an opportunity to ventilate their defence and to prove their defence at trial.

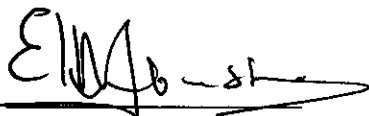
[8] To the contrary the respondent's counsel contended in argument that the status of the CC will not assist the applicants because even upon restoration of the CC the members remain liable. He referred me to the judgment in Commissioner, South African Revenue Service v Mendes 2001 (4) SA 934 at 937E as authority that the liability of members of a CC remains intact despite restoration. The court in that case concluded that although in terms of s 26 (7) of the Close Corporation Act(the Act) the effect of restoration of registration of a CC is that the CC is deemed to have continued existence as from the date of deregistration as if it were never deregistered, however, that does not mean that the member's liability previously attracted is extinguished. This being so, according to that court, because the legislation does not provide either expressly or by implication for the extinction of the member's liability once having arisen by operation of s 26 (5) of the Act.

[9] My view is that the status of the CC, whether the CC was registered or liquidated, is pertinent to the determination of whether the applicants are liable for the debts of the CC or not. Having concluded that the applicants are liable for the debts of the respondent on the basis of deregistration and/or reregistration it is my opinion that there are prospects of success that another court may come to the conclusion that the CC was under liquidation.

[10] Accordingly I make the following order:

10.1 Leave to appeal to the full bench of the High Court Gauteng Division,  
Pretoria is granted.

10.2 The costs of this application are to be costs in the appeal.



E. M. KUBUSHI  
JUDGE OF THE HIGH COURT

**Appearances:**

HEARD ON THE	: 29 MAY 2014
DATE OF JUDGMENT	: 3 JUNE 2014
PLAINTIFFS' COUNSEL	: ADV D H WINJBEEK
PLAINTIFFS' ATTORNEY	: BEN GROOT ATTORNEYS INC
DEFENDANTS' COUNSEL	: ADV L K VAN DER MERWE
DEFENDANTS' ATTORNEY	: CAWOOD ATTORENYS