

THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA



CASE NUMBER: 80173 / 2015

DATE OF HEARING: 14 OCTOBER 2016

DATE OF JUDGMENT: 21 OCTOBER 2016

In the matter between:

- (1) REPORTABLE: YES / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES / ~~NO~~
(3) REVISED.

21-10-2016

DATE

SIGNATURE

JACOBUS HENDRIK JOHANNES STEENKAMP

Applicant

and

WILLEM JACOBUS NIEMAND MURRAY

Respondent

J U D G M E N T

AVVAKOUMIDES, AJ

[1] This is an application in terms of which applicant seeks an order that the respondent be held personally liable for all or any debts and other liabilities of Wimma Wyne CC (in liquidation), a close corporation incorporated in terms of the laws of the Republic of South Africa under registration number 2007/247513/23 ("the CC"), owing to applicant and that the respondent be ordered to pay the costs of the application.

[2] The applicant's claim is based on section 64 of the Close Corporations Act, 69 of 1984 ("the CC Act") which reads as follows:

"64. Liability for reckless or fraudulent carrying-on of business or corporation.

- (1) If it at any time appears that any business of a corporation was or is being carried on recklessly, 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 of 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.
- (2) If any business of a corporation is carried on in any manner contemplated in sub-section (1), every person who is knowingly a party to the carrying on of the business in any such manner shall be guilty of an offence."

- [3] The applicant's notice of motion and founding papers were served upon respondent on 22 October 2015. On 3 December 2015 the respondent delivered his opposing papers in which he raised an *in limine* point of prescription and denies that he carried on the business of the CC in a reckless and fraudulent manner with the intent to defraud applicant.
- [4] The undisputed background facts are as follows. During or about January 2008 an agency agreement was concluded between applicant and the CC in terms of which it was agreed that the CC would act as applicant's agent for the sale of wine to retailers in the Gauteng area ("the agency agreement").
- [5] In terms of the agency agreement the CC agreed to market and sell wine on behalf of applicant to retailers in Gauteng and notably to retailers within the Pick n Pay group. In turn, applicant agreed to pay the CC a basic fee, together with storage and delivery costs, as well as commission for each bottle of wine sold. It was an express term in the agency agreement that the CC would pay all monies received from retailers in payment for wine directly to applicant, upon receipt of which applicant would pay a 10% fee to the CC as commission.
- [6] During the currency of the agency agreement the CC fell in arrears in respect to the sums due to applicant and failed to make payment to applicant for sums received on his behalf. At all material times the wines sold by the CC would remain the property of applicant and that all monies received by the CC in respect to such sales would be paid directly to applicant.

- [7] On 6 September 2012 the applicant obtained default judgment against the CC for payment in the sum of R424 796.12 on the basis of monies due to him in terms of the agency agreement. On 10 May 2013, the CC was placed under voluntary winding-up. On 5 November 2013, the applicant's attorneys of record addressed a letter to the liquidators of the CC informing them that applicant obtained judgment against the CC in the aforementioned sum and requesting them to investigate the CC's transactions prior to its liquidation, and the respondent's role in respect thereto.
- [8] The respondent responded by way of a letter on behalf of the CC in which he explained that the CC acted as applicant's agent for the sale of wine within the Gauteng area. The respondent explained that the CC failed to pay over sums held by it to applicant because it utilised such monies for the payment of its operational expenses. The respondent expressed himself in the following terms:

"... ons moes die inkomste aanwend om die bedryfsuitgawes mee te betaal want Groenland wou nie die koste aan ons betaal voordat ons hulle nie betaal het nie.

Ons is van mening dat indien Groenland elke maand hulle kostes en kommissie aan ons oor betaal het en ons nie met die inkomste ons bedryfs uitgawes moes betaal het nie sou die BK sy verpligtinge kon nakom maar die skuld las het net te veel geword en ons het na raadpleging met Mnr Gerhard Scheepers besluit om die BK te likwideer."

- [9] On 3 February 2015 an insolvency inquiry in terms of section 152 of the Insolvency Act, 24 of 1936 was held in Pretoria. The relevant exchange reads as follows:

"ADV BOTHMA: You understand that you acted as an agent? Yes or No?

W MURRAY: Yes

ADV BOTHMA: You understand that you never became the owner of the wine? Yes or no?

W MURRAY: Yes

ADV BOTHMA: You understand that you took money from the retailers on behalf of your client's (sic) i.e. Groenland.

W MURRAY: All the farmers.

ADV BOTHMA: You accept that you use (sic) that money to pay the running expenses of the cc.

W MURRAY: Yes."

- [10] Pursuant to the evidence obtained in the inquiry the applicant instituted the present proceedings. Section 64 of the Act creates a remedy for a creditor in the circumstances set out in that section. A creditor who wishes to rely on the provisions of section 64 of the CC Act must show that the respondent was knowingly party to the carrying-on of the business of the CC recklessly, with gross negligence or with intent to defraud any person or for any fraudulent purpose. In this case the CC throughout acted as the agent of applicant and it was obligated to immediately pay all sums as received from retailers to applicant.

- [11] The position of an agent that misappropriates funds held on behalf of his principal for his own benefit was considered in the matter of *S v Kotze* 1965 (1) SA 118 (A). In that case the defendant received cheques on behalf of his principal and appropriated the funds for his own benefit. The then Appellate Division expressed itself in the following terms:

“Die mandaat waarvolgens A die tjeks ontvang het was om die fondse daardeur verteenwoordig tot voordeel van B te belê. Deur, teenstrydig met daardie mandaat, die tjeks ter vereffening van sy privaat skulde te deponeer, het appellant – onderhewig alleenlik aan enige spesiale verdediging wat hy op die besondere feite van die geval miskien kon opper ... – ’n toeëiningshandeling gepleeg wat – gestel dat die orige elemente van die misdaad van diefstal aanwesig is – as niks anders as ’n *fraudulosa contrectatio* beskou kan word nie.”

- [12] It thus follows that where an agent knowingly, and without the permission of his principal, uses funds held on behalf of his principal for his own benefit, such conduct constitutes fraudulent behaviour. The respondent, by his own admission, both by way the CC’s letter aforesaid and under cross-examination in the section 152 examination, knowingly caused the CC to utilise funds held on behalf of applicant to pay for its operational expenses.
- [13] The respondent raised a point *in limine* to the effect that the applicant’s claims against respondent have prescribed. The respondent submitted in his papers as follows:

"It is submitted that the Applicant, having obtained judgement against Wimma Wyne in excess of three years prior to the launching of the current application, never indicated or raised any concern to the effect that the Respondent was to be held liable for the debts of Wimma Wyne. This application constitutes a mere after-thought subsequent to an insolvency enquiry where the Applicant realised that Wimma Wyne had insufficient funds in order to ensure a dividend in respect of the Applicant's claim, which claim has not been proven against the insolvent and liquidated estate."

- [14] Section 12(1) of the Prescription Act, 68 of 1969 ("the Prescription Act"), provides that "Prescription shall commence to run as soon as the debt is due." Section 12(3), introduced by way of an amendment in 1984, provides that:

"A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care."

- [15] Counsel for the applicant submitted that a distinction must be drawn between the facts which must be proved to disclose a cause of action (*facta probanda*) and the evidence which proves such facts (*facta probantia*). It follows thus that a cause of action for the purposes of prescription means:

"... every fact which it would be necessary for a plaintiff to prove, if traversed, in order to support his right to the judgement of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved."

- [16] The application of the Prescription Act to claims in terms of Section 64(1) of the CC Act was considered in the matter of *Burley Appliances Ltd v Grobbelaar N.O. and Others* 2004 (1) SA 602 (C). The court held that section 64 of the Act created a new remedy or right which became available to a creditor in the circumstances set out therein and that prescription would commence once:

“... it appears that any business of the corporation was or is being carried on recklessly, with gross negligence or with intent to defraud any person or for any fraudulent purpose and the corporation has debts or other liabilities, a creditor can enforce the remedy which was created by s 64.”

- [17] In this case the first instance upon which the applicant learnt (and could reasonably be expected to learn) of the fraudulent manner in which respondent conducted the business of the CC was when respondent acknowledged that he caused the CC to use funds held on behalf of applicant for its own benefit. This fact first came to light in the response to applicant's attorney's letter of 5 November 2013. It therefore follows that the earliest date on which prescription in this matter could have commenced would be sometime after 5 November 2013 and not when applicant obtained judgement against the CC on 6 September 2012, as alleged by the respondent. I am of therefore of the view that there is no substance in the point *in limine* and it stands to be rejected. The remaining submissions by the respondents to the effect that the applicant had failed to show on the probabilities that the respondent had acted fraudulently are similarly rejected.

- [18] The applicant's counsel submitted that I should order that costs must be paid on the scale as between attorney and client based on the respondent's conduct. He submitted that this case warrants a special cost order on a scale as between attorney and client because the respondent's denial in the answering affidavit that he misappropriated the applicant's funds for the benefit of the CC was in direct contrast with the respondent's evidence in the section 152 inquiry coupled with the respondent's explanation in the letter he sent to the applicant's attorneys. The opposition of the current application was accordingly vexatious. The applicant relied on the case of *In Re: Aluvial Creek Ltd* where Gardiner JP held as follows:

"An order is asked for that he pay the costs as between attorney and client. Now sometimes such an order is given because of something in the conduct of a party which the Court considers should be punished, malice, misleading the Court and things like that, but I think the order may also be granted without any reflection upon the party where the proceedings are vexatious, and by vexatious I mean where they have the effect of being vexatious. There are people who enter into litigation with the most upright purpose and the most firm belief in the justice of their cause, and yet whose proceedings may be regarded as vexatious when they put the other side to unnecessary trouble and expense which the other side ought not to bear. That I think is the position in the present case."

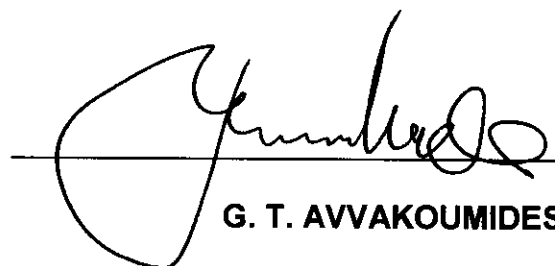
- [19] I am inclined to agree that the cost order should be on a punitive scale, given the facts of the case. The respondent did act fraudulently in his conduct. He put the applicant to unnecessary effort and expense to recover monies so misappropriated. I am thus of the view that respondent's opposition of the

current application was vexatious and that a cost order on the scale as between attorney and client is justified.

[20] I accordingly make the following order:

[20.1] The respondent is declared to be personally liable for all and any debts and other liabilities of Wimma Wyne CC (in liquidation), a close corporation duly incorporated in terms of the laws of the Republic of South Africa with registration number 2007/247513/23, owing to applicant.

[20.2] The respondent is ordered to pay applicant's costs on a scale as between attorney and client.

A handwritten signature in black ink, appearing to read 'G. T. Avvakoumides', is written over a horizontal line.

G. T. AVVAKOUMIDES
ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

DATE: 21 OCTOBER 2016

Representation for Applicants:

Counsel: P.S. Bothma

Instructed by: Marais Muller Attorneys

Representation for Respondent:

Counsel: B. Lee

Instructed by: Scheepers Attorneys