

IN THE LABOUR COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: C629/2000

DATE: 2-3-2004

In the matter between:

ABRAHAM C DAVIS Applicant

and

CTS TRANSPORT CC First Respondent

GARY HUGH GOLD Second Respondent

J U D G M E N T

NGCAMU, AJ:

1. In this matter, the applicant who was employed by the first respondent, filed an application for an order in the following terms:

1. Directing that execution of the order granted in the above Honourable Court on 20 February 2001 be levied against the member of members of above, the respondent.
2. Directives for possible substitution of parties.
3. Cause of suit if the matter is opposed.
4. Further alternative relief.

This application is opposed by the second respondent, Mr Gary Hugh Gold, who is represented in this matter as well.

2. From the documents that have been filed and from the submissions that have been made, it is clear that the award was issued against Container Transport Services CC. However, at a later stage

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when the matter was in court, this citation was corrected to read "CTS Transport CC" as the correct employer of the applicant. It therefore meant that the employer who was sued by the applicant was CTS Transport CC and that is the close corporation

against which execution had to be made.

3. The second respondent is the only respondent opposing this application as the first respondent has decided to abide by the decision of the Court. In any event, the order that the Court can make in this matter cannot affect the first respondent.

4. On behalf of the second respondent it has been argued that the Court is now *functus officio* and this matter cannot be reopened again for the inclusion of the second respondent. It appears from the papers that originally the applicant was employed by Gold Line Carriers CC and the name of the close corporation was later changed and the applicant remained employed. Mr Gold was a member of the close corporation that employed the applicant and also a member of another close corporation known as Trans AM Corporation. The Trans AM CC was in fact a brokerage company operating in the same premises as the CTS Transport CC.

5. After the award had been made an order of Court, the applicant sought to execute the judgment. However, there was a *nulla bona* return as the first respondent did not have any assets at that stage. The applicant has argued that Mr Gold should be entered as the second respondent so that execution could be made against him. The problem with the applicant's application is that throughout these proceedings

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when the matter started, he knew that Mr Gold was a member of the CC there was no attempt at any stage to join Mr Gold as the second respondent.

6. But that does not end the problem for the applicant because even if that was done at an early stage another difficult problem would be that CTS Transport CC was a close corporation and the applicant filed an application at the CCMA against the close corporation and not against Mr Gold in his personal capacity. For the applicant to now come at this late stage to seek an order that Mr Gold be added as the second respondent will be a difficult task for the applicant. It is difficult in the sense that the

applicant will have to prove that Mr Gold committed an offence and contravened the Close Corporations Act and for that reason he has to be found to be liable for the debts of the first respondent. The only reason that has been brought up by the applicant is the argument that the second respondent allowed Trans AM CC to act on its behalf, thereby deceiving the applicant that it was the employer.

7. I disagree with that for the reason that it has never been argued by the applicant at any stage that he was not sure who was the correct employer. The applicant has argued that if the Court does not grant the order prayed, it means that the judgment will not be enforceable on the basis that the first respondent does not have any assets. It is unfortunate for the applicant but it is not unknown that companies and close corporations do become dormant and at times they become insolvent and they are liquidated, in which case the creditors do not get anything at all. This is the situation that the applicant is facing here.

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Unless the applicant can prove to the Court that there was any wrong- doing on the part of Mr Gold and on the part of the first respondent, and that both respondents contravened the Close Corporations Act, the Court cannot come to the assistance of the applicant.

8. I must also indicate that the Rule 20 that the applicant seeks to rely upon is not applicable in this case it does not apply for the reason that Rule 20 refers to entities that are not incorporated, individuals with certain trading names and associations, but nowhere can it be said that it applies to the close corporations and to the companies. The companies and close corporations retain their corporate identity and are separate from their members. Unless the applicant or a party is able to prove to the Court that the Act was contravened, the Court cannot make an order against a member of that close corporation or, if it is a company, against the director or any shareholders of that company.

9. In the present case, the applicant's application does not have any basis on which the Court can rely for the submission that Mr Gold should be added and that the (indistinct) should be levied against his property. It is correct that the assets that existed at the time have now been taken over by Trans AM CC but that has been explained by the second respondent. It also appears in the papers that the access(?) that existed were acquired by Trans AM CC after paying the notarial bond and therefore they become the assets of Trans AM CC and not of the first respondent. It is for that reason that this Court is not in a position to direct that execution should be levied against Mr Gold's assets. In any event, the Court cannot make such an order unless Mr Gold is joined as

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a respondent in these proceedings but now it is too late because you cannot join a party after a judgment and, besides that, the problem that the applicant has is that he has waited for such a long time to make this application to join the second respondent and that is done only because he is not getting anything from the first respondent. That does not justify this late application on the part of the applicant.

10. In the circumstances should fail. I have been asked that I should make an order for costs against the applicant. The Court has a discretion on whether or not to make an order for costs. I have taken into account that the applicant, although he says he is a layman, he appears to know the law if one looks at the papers that he has drafted and the heads of argument that he has filed, he may claim to be a layman on the basis that he is not admitted perhaps as an attorney but the applicant knows exactly what he was doing. However, he was ill-advised to proceed with this application. Had he correctly interpreted the Close Corporations Act he would have seen that Rule 20 and section 65 of the Close Corporations Act will not assist him. He should also have known that if the close corporation is dormant and has no assets, a party cannot go against the members unless it can prove any wrong-doing on the part of the close corporation or any members of the close corporation. In the circumstances I have

come to the conclusion that the second respondent should be entitled to the costs of his opposition.

11. In the result the order that I make is that the application by the applicant is dismissed. The applicant is ordered to pay the second respondent's costs.

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JUDGMENT

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