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IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

Case no: C 352 / 07

In the matter between:

DENNIS MEYER	**Applicant**
and	
HORIZON CARPET MANUFACTURERS CC	**First respondent**
VALUWAYS SEVEN CC	**Second respondent**
FUAD WEPENER	**Third respondent**

JUDGMENT

STEENKAMP J:

INTRODUCTION

1] Does the Labour Court have jurisdiction to pronounce on a claim in respect of sections 64 and 65 of the Close Corporations Act[1]?

2] This jurisdictional issue arose in the context of an application for

1 Act 69 of 1984

amendment.

BACKGROUND

3] The main dispute in this matter concerns the alleged failure of the respondents to pay the applicant leave pay, arrear remuneration and notice pay after his dismissal. The applicant also claims that the respondents have failed to pay over statutory UIF contributions and PAYE; and that the respondents have not provided him with IRP5 income tax certificates for the tax years 2002 to 2006.

4] The applicant was employed by the first respondent, Horizon Carpet Manufacturers CC, a close corporation registered as such. He was also appointed to act as a salesperson for the second respondent, Valuways Seven CC. After he had been dismissed for operational requirements, he was reinstated to those positions in August 2004. At the time, first and second respondents were represented by the third respondent, Fuad Wepner. Wepner is the described as "the sole member and owner" of Horizon and Valuways.[2] The employee's employment was terminated again on 28 November 2006.

THE CAUSE OF ACTION

5] The applicant founds his cause of action mainly in section 77(3) of the Basic Conditions of Employment Act[3] (BCEA). He alleges that the dispute concerns his contract of employment.

6] That subsection provides the following:

> "The Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract."

2 For ease of reference, I will continue to refer to the respondents in the main dispute – who are the applicants in the application to amend – as "the respondents". I will refer to the applicant in the main dispute as "the applicant" or "the employee".
3 Act 75 of 1997.

7] The applicant then claims[4] that:

> "It is also a matter in terms of which the Honourable Court has jurisdiction in terms of sections 64(1) and 65 of the Close Corporations Act 69 of 1984. The matter has been referred to the above Honourable Court by the applicant by virtue of the allegation that the respondent has failed to make payment of remuneration in terms of the provisions of the aforesaid Act and/or the terms of the applicant's contract of employment."

8] This paragraph is not clearly drafted. The applicant does not state whether he is referring to one, two, or all three of the respondents. Neither is it clear if the "aforesaid Act" refers to the Close Corporations Act or the BCEA.

9] It becomes somewhat clearer when regard is had to the basis upon which the applicant seeks to hold the third respondent (Wepner) personally liable. He says in his statement of claim[5]:

> "Applicant furthermore respectfully contends that by virtue of the provisions of s 63(4) and 64(1) of the Close Corporations Act 69 of 1984 that [*sic*] the third respondent is and should be held to be jointly and personally liable responsible [*sic*] for the debts and liabilities referred to in 4.17, 4.24, 4.26, 4.27, 4.33 and 4.36 above. [6]
>
> Applicant contends that the third respondent has joint and personally [*sic*] liability by virtue of amongst others knowingly and intentionally failing and refusing to appoint an accounting officer as contemplated by section 63(1)(h).
>
> In addition applicant contends that the third respondent in his capacity as sole and managing member carried on the business of first and second respondent recklessly, negligently and fraudulently as contemplated by section 64(1)."

10] The relevant sections of the Close Corporations Act that the applicant relies upon, are the following:

> "**64**. **Liability for reckless or fraudulent carrying-on of business of corporation.** – (1) If it at any time appears that any business of a corporation was is being carried on recklessly, with 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

4 In para 5.3 of his statement of claim
5 i.e. the referral in terms of rule 6(1), in para 4 of the statement of claim.
6 Those claims relate to remuneration; commissions payable; leave pay; and notice pay.

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.

65. Powers of court in case of abuse of separate juristic personality of corporation. – 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."

THE AMENDMENT

11] The respondents filed a response in terms of rule 6(3)[7] on 6 August 2007. In that response, they did not take issue with the averment in paragraph 5.3 of the applicant's statement of claim that this court has jurisdiction to decide on the claim in terms of ss 64(1) and 65 of the Close Corporations Act. In fact, they noted that "the contents hereof are not in dispute".

12] The respondents subsequently appointed new attorneys, who are now on record for them. On 7 October 2010, the new attorneys filed a notice of intention to amend the response. They do not take issue with this court's jurisdiction in terms of s 77(3) of the BCEA. However, they wish to amend the response as follows:

"The contents of sub-paragraph 5.3 of the statement of claim are denied. In particular, respondents deny that this Court has jurisdiction in respect of the applicant's claims in terms of sections 63, 64 and/or 65 of the Close Corporations Act 69 of 1984 (as set out *inter alia* in paragraphs 4.53 to 4.56 of the statement of claim)."

13] The applicant (i.e. the employee) opposes the application for amendment. He contends, firstly, that the respondents had already admitted the jurisdictional question and cannot now amend that admission; and

7 Erroneously headed : "Respondents' reply"

secondly, that the proposed amendment is bad in law.

14] The parties were *ad idem* that the point of law – ie whether this court has jurisdiction in terms of the disputed paragraph – should be determined at the same time as the application to amend.

Application to amend: The legal principles

15] Generally, a court will allow an amendment if the following requirements are satisfied:[8]

15.1 The amendment must not be sought in bad faith;

15.2 The amendment must not cause prejudice to the other party that cannot be corrected by way of a postponement, if necessary, and an appropriate costs order against the applicant for amendment.

16] It does not appear to me that the present amendment is sought in bad faith. The respondents were under a duty to raise the jurisdictional point as soon as they became aware of it in order to avoid the possibility of wasting the court's time or the parties' resources.[9] The respondents' previous legal representatives were not alive to the jurisdictional point. Their previous attorney, Luke Brodziak, confirms that on affidavit. They only became aware of the point when their present counsel raised it in consultation with the new attorneys on 7 September 2010.

17] The potential prejudice to the employee depends upon the validity of the legal point raised. If it is upheld, and the amendment accordingly granted, it would render the statement of claim excipiable in respect of that claim (dealing with Wepner's liability in terms of the Close Corporations Act). That would evidently prejudice the employee. Hence the necessity to determine the point of law in order to determine whether the amendment should be allowed.

8 *Moolman v Estate Moolman* 1927 CPD 27 at 29.
9 *Rauff v Standard Bank Properties* 2002 (6) SA 693 (W) 702 I.

Previous admission

18] It is so that the respondents admitted to this court's jurisdiction in their response and in the pre-trial minute. But the admission is not a factual one. It is a legal point going to the jurisdiction of this court to entertain the claim in terms of the Close Corporations Act. There is no bar to amending pleadings with the consequence that an admission in the original statement of claim is withdrawn. The party seeking the amendment is merely required to furnish an explanation as to why the admission was made, and the reasons for not seeking to withdraw it. The explanation in this case is clear: the respondents' previous attorneys were not alive to the jurisdictional point, and they have now received advice from their new legal representatives that they should raise it.

19] I would therefore not refuse the amendment on this ground.

Is the proposed amendment good in law?

20] Generally, an amendment is not allowed where its introduction will result in the pleading being excipiable.[10] I think it is fair to say that this is the crux of the objection to the proposed amendment.

21] Mr *Leslie,* who appeared for the respondents, submitted that the jurisdiction of this court was a simple matter of interpretation of the Close Corporations Act.

22] In that Act, "Court" is somewhat circuitously defined to mean, in relation to any close corporation, "any court having jurisdiction in terms of section 7."

23] Section 7 of the Close Corporations Act, in turn, reads as follows:

> "**7. Courts having jurisdiction in respect of corporations.** – For the purposes of this Act any High Court and any magistrate's court, within whose area of jurisdiction the registered office or the main place of business of the corporation

10 *Krischke v Road Accident Fund* 2004 (4) SA 358 (W) 363B.

is situated, shall have jurisdiction. "

24] That is how the section reads at present, after it had been substituted by section 1 of Act 64 of 1988 and by section 2 of Act 26 of 1997.

25] The Labour Relations Act[11] came into force on 11 November 1996. Section 157 deals with jurisdiction. It provides as follows:

> "(1) Subject to the Constitution and section 173, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court.
>
> (2) The Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution of the Republic of South Africa, 1996, and arising from –
>
> (a) employment and from labour relations;
>
> (b) any dispute over the constitutionality of any executive or administrative act or conduct, or any threatened executive or administrative act or conduct, by the State in its capacity as an employer; and
>
> (c) the application of any law for the administration of which the Minister[12] is responsible."

26] Section 151(2) of the LRA is also relevant. It provides that:

> "The Labour Court is a superior court that has authority, inherent powers and standing, in relation to matters under its jurisdiction, equal to that which a court of a provincial division of the Supreme Court has in relation to matters under its jurisdiction."

27] Mr *Leslie* submits that s 157 of the LRA confers no jurisdiction on the Labour Court in respect of claims under ss 64 and 65 of the CC Act. The language of that Act, he says, is clear: only the High Court (or the magistrate's court, where applicable) has jurisdiction in respect of this claim. And it is trite, he says, that the Labour Court is not the High Court.

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11 Act 66 0f 1995
12 Defined as the Minister of Labour

28] Mr Leslie referred me to the decision in *Sethobsa v Kya-Sands Service Centre*[13] where it was held that:

> "[T]he Labour Court is not a division of the Supreme Court. Nor is it a High Court."

29] But there is a danger in quoting somewhat selectively from a judgment. Landman J went on to say in that *dictum:*

> "Although s 151 of the Labour Relations Act 66 0f 1995 (LRA) stipulates that the Labour Court is a superior court with authority, powers and standing equal to a provincial division of the Supreme Court, it is not a division of the latter court. Nevertheless the Labour Court approximates so closely to a High Court, albeit as a distant cousin, that I am of the opinion that the reference in section 8 of the Attorneys Act of 1979 to a Supreme Court extends to the Labour Court.[14] In any event the Labour Court is undoubtedly a superior court."

30] In the present context, I tend to agree with Landman J. Although this court would not generally entertain a dispute in terms of the Close Corporations Act, the cause of action relates to a claim in terms of the BCEA. The claim in terms of the CC Act is incidental to that claim, arising from the contract of employment, in the context where the employee seeks to hold Wepner – the sole member of the CC – personally liable.

31] The BCEA, in s 77(3), provides:

> "The Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment,[15] irrespective of whether any basic condition of employment constitutes a term of that contract."

32] The applicant's main cause of action is undoubtedly a matter concerning his contract of employment. The claim in terms of the CC Act, it appears to me, is incidental to that claim, in order to hold Wepner personally liable.

33] In the recent case of *SAMSA v McKenzie*[16] Wallis AJA considered the question of the jurisdiction of the Labour Court – albeit in a different

13 [2001] 7 BLLR 838 (LC) para [3]
14 My underlining.
15 My underlining
16 [2010] 3 All SA 1 (SCA)

context – in some detail. At the outset, he reminded us that a jurisdictional challenge must be considered in the light of the pleaded claim:[17] "[T]he question in such cases is whether the court has jurisdiction over the pleaded claim, and not whether it has jurisdiction over some other claim that has not been pleaded but could possibly arise from the same facts."

34] This court has often considered whether to pierce the corporate veil and the potential personal liability of a member of a CC.[18]

35] In *Footwear Trading CC v Mdlalose*[19] Nicholson JA reviewed a number of those judgments. He also remarked:[20]

> "I do not believe it is unkind to stigmatise the juristic machinations of the appellant in the above scenario as corporate ducks and drakes. I am aware that situations may arise where an employer is 'an empty legal shell stripped of its assets' while the real power of decision making and the ability to pay wages rests with another company or person.… Under such circumstances a foreign academic has argued that 'the company or other person or persons who (have) control of the undertaking in which the worker is employed' should be regarded as the employer. (See Hepple 'The Crisis in EEC Labour Law (1987) 16 *ILJ* (UK) 77 more especially at 113)."

He went on to say:[21]

> "The abuse of juristic personality occurs too frequently for comfort and many epithets have been used to describe the use against which the courts have tried to protect third parties, namely puppets, shams, masks and *alter ego.* However, the general principle underlying this aspect of the law of lifting the veil is that, when the corporation is the mere alter ego or business conduit of a person, it may be disregarded. The lifting of the veil is normally reserved for instances where the shareholders or individuals hiding behind the corporate veil of sought to be responsible. I do not see why it should not also apply where companies and close corporations are juggled around like puppets to do the bidding of the puppet master."

36] I am not suggesting that it has been shown that a similar scenario exists here. That is for the trial court to decide. However, at this amendment

17 At para [7]
18 See, for example: *Camdons Realty (Pty) Ltd v Hart* 1993 (14) *ILJ* 1008 (LAC); *PPWAWU v Lane NO* (1993) 14 *ILJ* 1366 (IC); *Esterhuizen v Million-Air Services CC (in liquidation)* (2007) 28 *ILJ* 1251 (LC).
19 [2005] 5 BLLR 452 (LAC)
20 At para [27]
21 At para [34]

stage, I must consider the possibility that the employee will be able to show that the sole member, Wepner, is personally liable.

37] Mr *Leslie* points out, though, that in cases such as *Footwear Trading* the court did not address sections 64 and 65 of the Close Corporations Act directly. It lifted the corporate veil without reference to those sections.

38] In *Million-Air*[22] Francis J did lift the corporate veil in order to establish joint liability. A jurisdictional question was raised with regard to the applicability of the CC Act. It was contended that the court could not grant the relief sought because it was not a court as defined in s 7 of that Act. But, on the facts of that case, Francis J found that ss 64 and 65 of the Close Corporations Act were not applicable.

39] But in *Veress v Granard CC t/a G2 Clothing*[23] Pillay J did consider the applicability of s 65 of the Close Corporations Act. The case pleaded was that the member of the CC grossly abused its juristic personality. Pillay J remarked: "This is a requirement of section 65 of the Close Corporations Act if Veress were to succeed in piercing the corporate veil." In that context, therefore, she assumed that the Labour Court does have jurisdiction. That *dictum* was followed in *Group 6 Security v Moletsane*[24]*.*

40] More recently, I had to consider similar principles in *Zeman v Quickelberge.*[25] Although the application was unopposed and the jurisdictional question was not raised, I had regard to the provisions if ss 64 and 65 of the Close Corporations Act in coming to the conclusion that the member of the CC in that case abused the juristic personality of the CC, thus acting as the puppet master; and that, in those circumstances, the corporate veil should be lifted. I also found that the business of the CC had been carried on fraudulently or recklessly, and that the member should be held personally liable for its debts.

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22 *supra* at para [12]
23 [2004] 3 BLLR 283 (LC) at para [24]
24 [2005] 11 BLLR 1072 (LC) para [53]
25 [2010] ZALC 122

41] I have considered that judgment again, and I am not persuaded that I was wrong in having consideration to those sections in that context.[26]

42] The context, in that case and in the cases cited therein, as in the present case, seems to me to be important. In the present matter, the relief sought in terms of the Close Corporations Act is an adjunct to the main pleaded claim in terms of s 77(3) of the BCEA. To hold that this court should determine the claim in terms of the BCEA, but the employee should bring a separate claim in the provincial division of the High Court for that portion of his claim that falls under the Close Corporations Act, would, in my view, lead to an unnecessary duplication of costs and delays that the legislature could not have intended.

43] Mr *Leslie* submits that the language of the Act is clear. It must be read, though, with the provisions of s 77(3) of the BCEA. And, insofar as it is required, a purposive approach is called for. One of the purposes of the LRA is to promote the effective resolution of labour disputes.[27] And in interpreting the Act, this court "must interpret its provisions to give effect to its primary objects."[28] This must be read together with the BCEA that has as one of its objects, "to give effect to ... the right to fair labour practices conferred by section 23(1) of the Constitution."[29]

44] In *Fish Hoek Primary School v GW*[30] the Supreme Court of Appeal referred with approval to the *dictum* of Stratford JA in *Bhyat v Commissioner for Immigration*[31] where it was held that 'the cardinal rule of construction of a statute' –

> "is the endeavour to arrive at the intention of the lawgiver from the language employed in the enactment… In construing a provision of an Act of Parliament the plain meaning of its language must be adopted unless it leads to some absurdity, inconsistency, hardship or anomaly which from the consideration of the

26 There has been no application for leave to appeal against the judgment.
27 LRA s 1(d)(iv)
28 LRA s 3(a)
29 BCEA s 2(a)
30 2010 (2) SA 141 (SCA) para [6]; referred to by Van Niekerk J in *NUMSA v Bell Equipment Company SA (Pty) Ltd* (D 753/09, 27 May 2010)
31 1932 AD 125 at 129

act and as a whole a court of law is satisfied the legislature could not have intended."

45] The SCA further referred to *Poswa v MEC for Economic Affairs, Environment and Tourism, Eastern Cape*[32] where Schutz JA held that the effect of that formulation –

"is that the court does not impose its notion of what is absurd on the legislature's judgement as to what is fitting, but uses absurdity as a means of defining what the legislature could not have intended and therefore did not intend, thus arriving at what it did actually intend."

46] A stringent and literal interpretation of the term "any High Court" in s 7 of the CC Act, when applied in the context of what is primarily a dispute arising from the contract of employment, would, in my view, lead to an absurdity or anomaly. It would have unjust consequences and cause a proliferation of actions that the legislature could not have intended.

CONCLUSION

47] In the context of this case, I am not persuaded that the Labour Court does not have jurisdiction to consider the applicability of ss 64 and 65 of the Close Corporations Act. It follows that the proposed amendment is not good in law and should be refused.

48] The application for amendment is dismissed. Costs are to be costs in the cause of the main referral.

32 2001 (3) SA 582 (SCA) para [11], referred to in para [7] of the *Fish Hoek* case.

STEENKAMP J

Date of hearing: 22 February 2011

Date of judgment: 11 March 2011

For the applicant: Mr G Marinus

Werksmans Inc

For the respondents: Adv GA Leslie

Instructed by Parker attorneys