

**1] IN THE HIGH COURT OF SOUTH AFRICA**

**2] (CAPE OF GOOD HOPE PROVINCIAL DIVISION)**

3] Case No 3181/06

4] In the matter between:

**5] AIRPORT COLD STORAGE (PTY) LIMITED**

*Plaintiff*

6] and

**7] NIZAAR EBRAHIM**

*First Defendant*

**ABBAS EBRAHIM**

Second Defendant

**H M M TERBLANCHE N O**

*(in his capacity as liquidator of*

*Sunset Beach Trading 232 CC (in Liquidation))*

Third Defendant

8] \_\_\_\_\_

**9] JUDGMENT: DELIVERED 22 MAY 2007**

10] \_\_\_\_\_

**11] GRIESEL J:**

12] The plaintiff in this matter, *Airport Cold Storage (Pty) Limited*, was a creditor of a close corporation known as *Sunset Beach Trading 232 CC (Sunset Beach or the corporation)*, which traded under the name and style of *Global Foods*. During the period March to June 2005 the plaintiff sold and delivered imported meat products and frozen vegetables to the corporation on open account. On 12 August 2005, when the corporation was placed into pro-

visional liquidation by order of this court, a balance of R278 377.19 remained owing according to the plaintiff's calculations.

13]The provisional order was made final on 27 September 2005. The plaintiff duly proved a claim against the corporation in liquidation for the amount outstanding. It received no dividend in the liquidation, however, since the corporation had no assets.

14]The plaintiff thereupon launched the present action, seeking to hold the first and second defendants personally liable for such debt in terms of the provisions of the Close Corporations Act 69 of 1984 (*the Act*). It is common cause that the first defendant, Mr Nizaar Ebrahim (*Mr Ebrahim Jnr*), who is the son of the second defendant, Mr Abbas Ebrahim (*Mr Ebrahim Snr*), was the sole member of Sunset Beach and was also its manager and in control of its business at all relevant times. The plaintiff alleges that Mr Ebrahim Snr was 'an employee, manager and/or officer of the corporation'. The third defendant is the liquidator of Sunset Beach, but no relief is claimed against him and he played no part in these proceedings as a litigant. I will accordingly refer to the first and second defendants collectively as 'the defendants', save where it is necessary to refer to either of them individually.

15]The plaintiff's claim is based on three alternative statutory causes of

action:

- First, the plaintiff relies on the provisions of s 64(1) of the Act, alleging that ‘during the period March to August 2005, the business of the corporation was carried on recklessly or for fraudulent purposes or with the intent to defraud the creditors of the company’.

- In the alternative, the plaintiff alleges that the incorporation and use of the corporation by the defendants constituted ‘a gross abuse of the juristic personality of the corporation as a separate entity’ in violation of the provisions of s 65 of the Act.

- The final alternative claim is directed against the first defendant alone, based on the provisions of s 63(h) of the Act, which holds a member of a close corporation personally liable, jointly and severally with the close corporation, for debts incurred by the corporation ‘where the office of accounting officer of the corporation is vacant for a period of six months’.

16]On the evidence presented in this matter, it is clear that the three individual causes of action are in fact inextricably intertwined and form part, to a greater or lesser extent, of one composite complaint of abuse of the separate juristic personality of Sunset Beach by the defendants. I accordingly propose dealing

with the matter on that basis and proceed to consider the legal requirements for this cause of action before examining the factual allegations advanced in support thereof.

### *Abuse of juristic personality*

17]One of the most fundamental consequences of incorporation is that a close corporation – just like a company – is a juristic entity separate from its members. Incorporation also entails ‘limited liability’ of members, with the result that they are generally not liable for the debts of the corporation. Furthermore, the assets of a corporation are the exclusive property of the corporation itself and not of its members.<sup>1</sup> In the *locus classicus* on this topic, *Salomon v Salomon & Company*,<sup>2</sup> Lord MacNaghten said the following with regard to some of the motives for incorporation:

*18]‘Among the principal reasons which induce persons to form private companies ... are the desire to avoid the risk of bankruptcy, and the increased facility afforded for borrowing money. By means of a private company a trade can be carried on with limited liability, and without exposing the persons interested in it in the event of failure to the harsh provisions of the bankruptcy law.’*

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<sup>1</sup> Cf Blackman *et al* *Commentary on the Companies Act* Vol 1 (2002, with loose-leaf updates, Revision Service 1) at 4-114–116.

<sup>2</sup> [1897] AC 22.

19]In the sphere of companies, the directors and members of a company ordinarily enjoy extensive protection against personal liability. However, such protection is not absolute, as the court has the power – in certain exceptional circumstances – to ‘pierce’ or ‘lift’ or ‘pull aside’ ‘the corporate veil’ and to hold the directors personally liable for the debts of the company.<sup>3</sup>

20]According to Blackman,<sup>4</sup> ‘veil piercing takes at least two forms. Firstly, there are cases where the court disregards the company and treats the members as if they had been acting in partnership (or where the company has a single member, as if he had been acting on his own behalf), with the consequence that they are, for example, held to be the owners of property otherwise owned by the company, or to be personally liable for its debts and other liabilities.’ (This is said to be the most frequently stated consequence of veil piercing.) Secondly, there are those cases where obligations incurred by shareholders in their personal capacity are treated as if they were incurred by the company. For present purposes, only the first form of veil piercing needs to be considered.

21]Whatever form it takes, veil piercing is an ‘exceptional procedure’<sup>5</sup> and, as

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<sup>3</sup> Blackman *et al op cit* at 4-133 *et seq.*

<sup>4</sup> 4(1) *Lawsa* 1<sup>st</sup> Reissue (1995) para 42.

<sup>5</sup> *Lawsa op cit* para 43.

pointed out by Scott JA in *Hülse-Reutter & Others v Gödde*,<sup>6</sup> a court has no general discretion simply to disregard the existence of a separate corporate identity whenever it considers it just or convenient to do so. However, the circumstances in which a court will disregard the distinction between a corporate entity and those who control it are ‘far from settled’:

*22]‘Much will depend on a close analysis of the facts of each case, considerations of policy and judicial judgment. Nonetheless what, I think, is clear is that as a matter of principle in a case such as the present there must at least be some misuse or abuse of the distinction between the corporate entity and those who control it which results in an unfair advantage being afforded to the latter.’ 7(my emphasis)*

23]In *The Shipping Corporation of India Ltd v Evdomon Corporation and Another*,<sup>8</sup> Corbett CJ required proof of ‘an element of fraud or other improper conduct in the establishment or use of the company or the conduct of its affairs’ before a court can pierce the corporate veil.

24]This requirement of fraud or other improper conduct finds resonance in the

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<sup>6</sup> 2001 (4) SA 1336 (SCA).

<sup>7</sup> Para 20. See also *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd and Others* 1995 (4) SA 790 (A) at 802H–J.

<sup>8</sup> 1994 (1) SA 550 (A) at 566E–F. See also the *Cape Pacific* case *supra* at 803.

provisions of s 65 of the Act,<sup>9</sup> where the Legislature, with regard to close corporations, has created a statutory remedy ‘which is equivalent to (the court’s) jurisdiction at common law to “pierce the corporate veil” in relation to a company’.<sup>10</sup> Liability under this section depends on a finding of ‘gross abuse of the juristic personality of the corporation as a separate entity’. However, no attempt has been made in the section to indicate the facts or circumstances that would qualify as a gross abuse of the juristic personality of the corporation as a separate entity. The courts are required, in other words, to give content to the open-ended concept of ‘gross abuse’, based on the facts of each particular case. This exercise does not take place in a vacuum, however, and it is axiomatic that the principles and categories developed with regard to piercing the corporate veil in the context of company law will serve as useful guidelines in this context.

25]The starting point is that veil piercing will be employed ‘only where special circumstances exist indicating that it [i.e. the company or close

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<sup>9</sup> Sec 65 reads as follows:

‘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.’

<sup>10</sup> Meskin *Henochsberg Commentary on the Close Corporations Act* (1997 with loose-leaf updates, Issue 13) at Com-189.

corporation] is a mere façade concealing the true facts'.<sup>11</sup> Fraud will obviously be such a special circumstance, but it is not essential. In certain circumstances, the corporate veil will also be pierced 'where the controlling shareholders do not treat the company as a separate entity, but instead treat it as their "alter ego" or "instrumentality" to promote their private, extra-corporate interests':<sup>12</sup>

*26]Although the form is that of a separate entity carrying on business to promote its stated objects, in truth the company is a mere instrumentality or business conduit for promoting, not its own business or affairs, but those of its controlling shareholders. For all practical purposes the two concerns are in truth one. In these cases there is usually no intention to defraud although there is always abuse of the company's separate existence (an attempt to obtain the advantages of the separate personality of the company without in fact treating it as a separate entity).'*<sup>13</sup>

27]Against this background, I turn to consider whether the plaintiff has established that the defendants have in fact abused the separate juristic personality of the close corporation in question.

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<sup>11</sup> *Lawsa op cit* para 44.

<sup>12</sup> *Id.* and cf also para 46.

<sup>13</sup> *Lawsa op cit* para 46.



### *Evidence*

28]The evidence presented on behalf of the plaintiff consists, firstly, of a substantial body of documentary evidence contained in exhibits A, B, C and F. Apart from various invoices and accounts, it includes a certified transcript of the proceedings at an insolvency enquiry into the affairs of Sunset Beach, held at the magistrate's court in Wynberg during November and December 2005.<sup>14</sup> The record was received as *prima facie* evidence of the proceedings recorded therein, in accordance with the provisions of s 68(1) of the Insolvency Act 24 of 1936.

29]In addition, the plaintiff also presented *viva voce* evidence by its managing director, Mr Patrick Gaertner; an accounting expert, Mr Derek Hanslo; as well as a representative from the liquidator's office, Mr Johan Theron. The defendants, in turn, also presented certain documentary exhibits contained in exhibits D1–3 and E and, in addition, called an accountant, Mr Nasief Price, as a witness. The defendants thereafter closed their case without themselves going into the witness box, despite earlier indications, during cross-examination of the plaintiff's witnesses, that they would be called to give evidence. The issues in dispute depend therefore on inferences to be drawn from evidence that is largely common cause.

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<sup>14</sup> Exhibit B483–659.

*Factual background*

30]Sunset Beach was incorporated as a 'shelf CC' on 18 June 2004. According to the founding statement, the sole member at that stage was one Christian Gouws with Malherbe Lourens as the first accounting officer, whereas the registered office was stated to be at 287 Lynnwood Road, Menlo Park 0081. On 20 January 2005, Mr Ebrahim Jnr was officially substituted as the sole member of Sunset Beach in the place of the original member, who simultaneously resigned.<sup>15</sup> However, no other changes to the details contained in the original founding statement were recorded, nor was a new accounting officer appointed.

31]The day-to-day business of Sunset Beach was attended to by Mr Ebrahim Jnr. In addition to his membership in Sunset Beach, Mr Ebrahim Jnr is also the sole member of two further close corporations, namely Ehbros Property Investments No 7 CC (*Ehbros*) and Zaki Meat Market CC (*Zaki Meat*), both of which featured prominently in this case.

32]Sunset Beach traded from premises in Athlone. Mr Ebrahim Jnr had previously, from approximately 2003, traded from the same premises as *Pacific Foods* under the corporate guise of Zaki Meat. This business had extensive dealings with the plaintiff over a period of some 18 months or so. At

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<sup>15</sup> Exhibit A4 and E, read with s 15(2) of the Act.

the beginning of 2005, when Zaki Meat owed the plaintiff in the region of R600 000, it was decided that this close corporation would cease trading and that the business conducted by it up to that stage would, with effect from March 2005, be conducted in the name of Sunset Beach, trading as *Global Foods*. Much was made during the trial of this change-over of the business from Zaki Meat to Sunset Beach. I will deal with this issue in more detail below. Suffice it for present purposes to state that, as from the date mentioned above, Sunset Beach for all practical purposes took over the business of Zaki Meat and continued where the latter had left off. In the result, the plaintiff's accounts also reflect that, with effect from 1 March 2005, its debtor was Sunset Beach.

33]From the inception of its business, Sunset Beach ordered meat products and frozen vegetables from the plaintiff in fairly substantial quantities. However, towards June 2005 it encountered severe cash-flow problems. The total balance outstanding at that stage amounted to some R250 000. This led to various discussions and negotiations between the plaintiff and Mr Ebrahim Snr in order to try and salvage the position. Certain post-dated cheques were presented on behalf of Sunset Beach, some of which were dishonoured upon presentation. The plaintiff's attorneys eventually addressed a statutory letter of demand<sup>16</sup> to Sunset Beach, calling for settlement of the full outstanding

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<sup>16</sup> In terms of s 69(1)(a) of the Act.

balance of R278 377.19 within 21 days. In response, Mr Ebrahim Snr, through his erstwhile attorneys, offered to pay the plaintiff an amount of R225 000 towards its claim. This offer, however, was subject to ‘certain paperwork and procedures’ which first had to be completed by Mr Ebrahim Snr.<sup>17</sup> This offer was not acceptable to the plaintiff, who proceeded with the application for liquidation.

### *A family business*

34]In considering whether the plaintiff has discharged the onus of showing gross abuse of the juristic personality of Sunset Beach, I bear in mind, firstly, that it formed part of what was essentially a family business or, to be more precise, a conglomerate of associated family businesses, involving Mr Ebrahim Snr and his sons. Although both defendants, in their evidence at the enquiry, denied that Mr Ebrahim Snr was an employee or officer of Sunset Beach and attempted as far as possible to minimise his role in its affairs, it is clear from the evidence that he actively assisted his son in the running of Sunset Beach, as well as in various other family businesses. This was confirmed by Mr Gaertner, who testified that – save for a few isolated occasions – he always dealt with Mr Ebrahim Snr when it came to placing orders; negotiating prices; collecting stock; making payment; and general

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<sup>17</sup> B467.

negotiations regarding the affairs of Sunset Beach.

35]He and the rest of the family utilised a host of entities and trading names at different stages. Thus, Mr Ebrahim Snr started off in approximately 1979, trading in his personal capacity under the business name of *Broadway*. At some stage, however, he ‘gave it over to the children’.<sup>18</sup> Mr Ebrahim Jnr, as mentioned earlier, is the sole member, not only of Sunset Beach, but also of Ehbro and Zaki Meat. Ehbro conducted business as *Jimmy’s Supermarket* and later also as *Bakerman’s Choice*. Zaki Meat traded as *Pacific Foods*, whereas business was also carried on at some stage under the trade name *Pacific Chilled & Frozen Foods*. Finally, Sunset Beach, trading as *Global Foods*, came on the scene.

36]Further proof of the involvement of the family in all of the business entities came from Mr Ebrahim Jnr who, during an unguarded moment, conceded at the enquiry that ‘(t)here was a business *in the family* called Pacific Foods’.<sup>19</sup> (my emphasis) This same mentality was revealed in their evidence at the enquiry, where both father and son (unconsciously) repeatedly used the plural pronouns ‘we’ and ‘us’ and ‘our’ with reference to the business of Sunset Beach.

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<sup>18</sup> B614/28.

<sup>19</sup> B513/11.

37]Further examples of this corporate confusion between the various business entities are the following: Sunset Beach traded from premises in Athlone, which it shared with Ehbros on an informal basis. It also used delivery vehicles as well as office furniture belonging to Ehbros. It made indiscriminate use of the bank account of Ehbros, both for the deposit of its own money and for paying its major creditor, namely the plaintiff. In addition, Sunset Beach simply 'took over' debtors of Zaki Meat and appropriated the proceeds. It utilised the same telephone and fax numbers as those appearing on invoices of Pacific Foods.

38]Thus it is apparent from their own evidence that both Mr Ebrahim Snr and his son had scant regard for the separate corporate identity of Sunset Beach – or of any of the other entities, for that matter.

#### *An informal business*

39]As is evident from the above, the business of Sunset Beach was conducted in a very loose and informal manner, with little or no regard for the requirements of the Act. Thus, it kept no conventional books of account. Instead, it utilised a set of standard commercially available Croxley Triplicate invoice books to record details of daily sales to its debtors. Details of its trade name, *Global Foods*, together with its business address, telephone and fax

numbers and VAT number were stamped on the invoices. (As mentioned above, the telephone and fax numbers were the same as those appearing on invoices of *Pacific Foods*.) However, the invoices contain no reference whatsoever to the corporate identity of Sunset Beach. (This omission in itself, of course, constitutes a breach of the mandatory requirements of s 23(2)(b) of the Act and can, in suitable circumstances, give rise to personal liability of the member(s) of the corporation responsible for such omission.)

40]The business was conducted largely on a cash basis. Payments received from the debtors were casually noted on the copies of the invoices. Apart from its own invoice books in respect of sales and deliveries, Sunset Beach also kept invoices from its creditors – mainly the plaintiff – in a lever-arch file. Although Sunset Beach had a current account at Absa Bank, Claremont, very little of its cash turnover found its way into its bank account. According to the evidence of Mr Hanslo, who examined the books of Sunset Beach at the request of the liquidator and whose evidence was not challenged in this respect, the invoice books reflected sales by Sunset Beach to its customers during the period March to August 2005 amounting to R1 818 254.64, of which only R148 607.70 – ie less than 10% – was deposited into the bank account of the business.

41]Although Sunset Beach was registered for VAT and although it collected VAT from its customers, no VAT was in fact paid over by it to the SA Revenue Services and no VAT returns were submitted. Moreover, although Sunset Beach employed between 10 and 20 employees, no payslips and no PAYE returns were kept.

42]Against this background, there seems to be considerable force in the plaintiff's allegation that 'no proper books of account were kept' by Sunset Beach. In answer, however, Mr *Khan*, who appeared on behalf of the defendants, argued that what the Act requires of a corporation is to keep 'accounting records', not 'books of account', and that it had complied with this requirement by keeping the records to which I have referred above.

43]I cannot accept this argument. Section 56 of the Act governs the keeping of 'accounting records'. It requires every corporation to keep in one of the official languages of the Republic 'such accounting records as are necessary fairly to present the state of affairs and business of the corporation and to explain the transactions and financial position of the business of the corporation'. Although the section does not purport exhaustively to describe the accounting records which are to be kept,<sup>20</sup> such records should include:

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<sup>20</sup> See also s 1, where 'accounting records' are defined to include 'accounts, deeds, writings and such other documents as may be prescribed'.



- ‘(a) *records showing its assets and liabilities, members’ contributions, undrawn profits, revaluations of fixed assets and amounts of loans to and from members;*
- (b) *a register of fixed assets showing in respect thereof the respective dates of any acquisition and the cost thereof, depreciation (if any), and where any assets have been revalued, the date of the revaluation and the revalued amount thereof, the respective dates of any disposals and the consideration received in respect thereof...*
- (c) *records containing entries from day to day of all cash received and paid out, in sufficient detail to enable the nature of the transactions and, except in the case of cash sales, the names of the parties to the transactions to be identified;*
- (d) *records of all goods purchased and sold on credit, and services received and rendered on credit, in sufficient detail to enable the nature of those goods or services and the parties to the transactions to be identified;*
- (e) *statements of the annual stocktaking, and records to enable the value of stock at the end of the financial year to be determined; and*

(f) *vouchers supporting entries in the accounting records.*<sup>21</sup>

44]A further requirement of s 56 is that the accounting records relating to (a) contributions by members; (b) loans to and from members; and (c) payments to members 'shall contain sufficient detail of individual transactions to enable the nature and purpose thereof to be clearly identified'.<sup>22</sup> Moreover, the accounting records referred to 'shall be kept in such a manner as to provide adequate precautions against falsification and to facilitate the discovery of any falsification'.<sup>23</sup> There is, however, no limitation in the provisions as to the form of the accounting records. Thus, they may be computerised.<sup>24</sup>

45]When considering the meaning of 'accounting records' in the context of the Act, the court must, in my view, apply a purposive approach. The accounting records are required in terms of the Act 'fairly to present the state of affairs and business of the corporation and to explain the transactions and financial position of the business of the corporation'. The records kept by Sunset Beach were basically limited to invoice books showing deliveries to its customers and payments received from them; invoices received from its creditors; and bank statements. It cannot be held, in my view, that these

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<sup>21</sup> Sec 56(1).

<sup>22</sup> Sec 56(2).

<sup>23</sup> Sec 56(3).

<sup>24</sup> Meskin *op cit* at Com-159.

records could ever fulfil the purpose required by the Act.

46]Furthermore, the Act itself, in s 56(1)(f), draws a distinction between ‘accounting records’, on the one hand, and the ‘vouchers’ supporting the entries in such records, on the other. What Sunset Beach kept, were simply the ‘vouchers’ from which ‘accounting records’ had to be compiled. I do not accept that these raw source documents qualify as ‘accounting records’ for purposes of the Act.

47]In any event, such ‘records’ as were kept by Sunset Beach were wholly inadequate fairly to present the state of affairs and business of the corporation. Thus, the records do not show, for example, all cash received and paid out by the corporation from day to day. As was evident at the enquiry, neither Mr Ebrahim Jnr nor his father could account for the apparent cash shortfall of some R350 000 at date of liquidation, save to suggest in vague and general terms that Sunset Beach had to pay rent in respect of premises and vehicles, salaries and various other unspecified overhead expenses.

48]Finally, the ‘records’ were not kept in such a manner as to provide adequate precautions against falsification and to facilitate the discovery of any falsification, as required by s 56(3) of the Act.

49]Based on the evidence as a whole, I agree with the plaintiff's submission, namely that Sunset Beach kept no proper books of account. This conclusion is also supported by the expert evidence of Mr Hanslo as well as the liquidator's representative, Mr Theron.

*No accounting officer*

50]A further example of the corporation's disregard for the requirements of the Act is to be found in the fact that it operated without having appointed an accounting officer from the date on which it commenced trading to the date of its provisional winding-up. In this regard, s 59(1) of the Act requires every corporation to appoint an accounting officer. Section 59(3) provides that '(i)f a vacancy occurs in the office of an accounting officer, whether as a result of a removal, resignation or otherwise, the corporation shall within 28 days appoint another accounting officer...'.

51]The defendants relied on the fact that, in terms of the founding statement registered in the office of the Registrar of Close Corporations, the name of Malherbe Lourens appears as first accounting officer. In the amended founding statement, issued by the Registrar on 20 January 2005, the change in membership is recorded, but Malherbe Lourens is still reflected as the accounting officer, who has not at any stage resigned as such.

52]To my mind, this approach is highly technical and formalistic. It is clearly the intention of the Act that there should be an accounting officer on a continuous basis; hence the provision in s 59(3) of the Act that requires a vacancy to be filled 'within 28 days', and the provisions of s 63(h), imposing

personal liability for the debts of the corporation on individual members where a vacancy exists for more than 6 months. It cannot be held that the mere reflection in the founding statement of the name of someone as accounting officer is sufficient compliance with the provisions of the Act. Mr Ebrahim Jnr apparently also saw it in this way because, when asked at the enquiry who the accounting officer of Sunset Beach was, he candidly conceded that it had *no* accounting officer.<sup>25</sup>

53]The clearest proof that Malherbe Lourens was not the accounting officer of Sunset Beach is the fact that N Price & Co accepted the appointment as accounting officer when the corporation applied for its VAT registration.<sup>26</sup> Mr Price made it clear in his evidence, however, that this had only been done ‘for convenience’ and that his firm had never acted served as accounting officer of Sunset Beach.

54]In any event, whether or not the corporation had *appointed* an accounting officer, it is clear that it did not *utilise* the services of any accounting officer, or the services of anybody else with any accounting skills, in circumstances where such skills were clearly required.

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<sup>25</sup> B503/25–504/22.

<sup>26</sup> Exh E.

*Started for a fraudulent reason*

55]The plaintiff further submitted that the incorporation itself of Sunset Beach constituted a further example of gross abuse of its juristic personality. In substantiation of its claim in this regard, the plaintiff pleaded that ‘the corporation was incorporated for the purposes of accepting transfer and control of the business of Zaki Meat Market CC in March 2005 so as to –

20.1.1 avoid the liquidation of Zaki Meat Market CC which had been trading in insolvent circumstances;

20.1.2 avoid the personal consequences that would have been visited on First and Second Defendants in the event of the liquidation of Zaki Meat Market CC;

20.1.3 defraud the creditors of Zaki Meat Market CC by the unauthorised cessation of the business of that close corporation and the stripping of any of its assets;

20.1.4 facilitate the continued trading of the insolvent business of Zaki Meat Market CC under the auspices and control of the Corporation.’

56]These very serious allegations were confirmed – virtually in so many words – by Mr Ebrahim Jnr, who testified as follows when asked at the enquiry why he stopped trading out of Zaki Meat and moved the business to Sunset Beach:<sup>27</sup>

*57]‘We wanted to start the business on an entirely new CC so that whatever business we did in the past with regard to the supermarket, the lease was on there, that we could start from fresh on a new CC.*

*58]But what was the purpose of that because by then you have already traded for a year.--- Yes*

*59]If not longer.--- Yes.*

*60]Through this Zaki Meats CC. Is that correct? --- Yes*

*61]And you said that the lease in fact either wasn’t registered or certainly wasn’t of much consequence. --- There was certain litigations or some disagreement with my previous landlord with regard to Zaki Meats. Right. So we needed to secure ourselves by actually starting on an entirely different CC so that we don’t – so that the business itself shouldn’t suffer any repercussions in the future as such.*

*62]So to protect the business against this pending litigation...--- Which I believe was sorted out.*

*63]Okay, but let me finish my question. To protect this business*

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<sup>27</sup> B525/2–526/6.



*against this pending litigation you decided to start trading out of a new CC. --- It wasn't really pending litigation but ...*

*64]Prospective litigation. --- It was minor but we actually preferred to actually start off on a different CC as such so we don't have the possibility of...*

*65]Okay, I am now – I originally understood and now I am a little bit more confused. Was the litigation the purpose for the commencement of trading out of Sunset Beach or not? --- that would be true, yes.*

*66]That was the purpose. --- Yes.*

*67]And the concern was that the assets and funds and everything arising out of the business would be prejudiced by the litigation. Or there was a prospect of that occurring, is that correct? --- Well, we didn't want to grow our business on a CC, right, that could have pending litigation on it. So that if we do grow the business that there won't be any risk in the business having to suffer due to any disagreement with the previous landlord.'*  
*(my emphasis)*

#### *Trading in insolvent circumstances*

68]A final example of gross abuse of the juristic personality of the corporation on which the plaintiff relies, is the allegation that during March 2005 the corporation accepted the assignment of a debt totalling R600 000 owing by

Zaki Meat to the plaintiff. This had the result, so the argument went, that the liabilities of Sunset Beach exceeded its assets right from the outset.

69]In their original plea, the defendants initially admitted that Sunset Beach had accepted the assignment of the debt of R600 000 owing at that stage by Zaki Meat, but pleaded that this was done ‘at the request of the plaintiff, represented by Mr Gaertner’.

70]In their amended plea, however, filed on the first day of the trial, the defendants retracted this admission by denying the plaintiff’s allegations of an assignment of the debt from Zaki Meat. Instead, they pleaded that during April 2005 the plaintiff ‘unilaterally and without the consent of the defendants transferred [to Sunset Beach] an amount of R700 718.08 owing to it by Zaki Meat Market CC in respect of the purchase of meat products during the period 1/3/05 to 29/3/05’.

71]This new version was categorically denied by Mr Gaertner, who testified that the change-over became necessary, quite simply, because Zaki Meat was not registered for VAT and because the plaintiff needed valid VAT registration numbers for its customers in order to satisfy the requirements of the revenue authorities. Mr Gaertner’s evidence in this regard was neither contradicted by any evidence from the defendants nor shaken during cross-

examination. On the contrary, direct corroboration for Mr Gaertner's version is to be found in the letter written by Mr Ebrahim Jnr to SARS on 10 March 2005, requesting the urgent allocation of a VAT number to Sunset Beach 'because of the legislation that came into action on 1 March 2005. My suppliers require a VAT number from myself & they refuse to supply me without one. This is jeopardising my newly found business'.<sup>28</sup>

72]Moreover, the amended plea does not accord with the evidence given by Mr Ebrahim Jnr at the enquiry. In his evidence, he conceded that Sunset Beach had knowingly taken over the debt of some R600 000 owing by Zaki Meat as 'that was the only way that we could continue trading'.<sup>29</sup> However, he described the transferring of the debt from Zaki Meat to Sunset Beach as 'basically just a formality so that we can continue trading and buying up our stock from Airport Cold Storage in the hope that we could trade that amount down from R600 000...'.<sup>30</sup> In this regard, he pointed out that 'there was an understanding that we could trade ourselves out of it'.<sup>31</sup> He also made it abundantly clear that 'the intention was to pay each and every cent, whatever was owing had to be paid'.<sup>32</sup> He proudly (and repeatedly) pointed to the fact

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<sup>28</sup> Exhibit E2.

<sup>29</sup> B537/20.

<sup>30</sup> B540/21–25.

<sup>31</sup> B539/18–19.

<sup>32</sup> B538/16–17; 540/19–20.

that by the date of liquidation, the original debt had been reduced ‘from R600 000 to R250 000’.<sup>33</sup>

73]In the circumstances, I find that Sunset Beach knowingly and willingly accepted liability for the *full* outstanding debt of Zaki Meat. In these circumstances, it is clear to my mind that Sunset Beach was in fact liable for whatever amount was outstanding at the date of liquidation, irrespective of whether the original debt was incurred by itself or by Zaki Meat.

74]Given the precarious financial position of Sunset Beach right from the outset, and given the highly competitive nature of the market in which they operated, the decision of the defendants to continue trading and to incur further debts in order to try and ‘trade out of its debt’ justifies an inference, according to the plaintiff, that the business of Sunset Beach was being carried on recklessly.<sup>34</sup>

75]The defendants presented a counter-argument, based on a *dictum* from an unreported English judgment quoted in Palmer’s *Company Law*<sup>35</sup> which, in turn, was quoted with approval by Goldstone JA in *Ex parte De Villiers &*

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<sup>33</sup> B538/14–15; 539/2–3, 540/26–28 and 543/25–26.

<sup>34</sup> See in this regard *Ozinsky NO v Lloyd & Others* 1992 (3) SA 396 (C) at 414G–H, quoted with approval in *Philotex (Pty) Limited & Others v Snyman & Others* 1998 (2) SA 138 (SCA) at 145I.

<sup>35</sup> (24ed) 1987 at 1463.

*Another NNO: In re Carbon Developments (Pty) Limited (in Liquidation)*<sup>36</sup>

and which reads as follows:

*76]‘In my judgment, there is nothing wrong in the fact that directors incur credit at a time when, to their knowledge, the company is not able to meet all its liabilities as they fall due.’*

77]As rightly pointed out by Adv *Van Helden* on behalf of the plaintiff, however, this statement was specifically disapproved by the Supreme Court of Appeal in the *Philotex* case, *supra*,<sup>37</sup> and no longer constitutes good law. I am accordingly unable to accept the argument presented on behalf of the defendants that there was any realistic prospect of trading themselves out of the debt trap into which they had landed themselves. The evidence shows on a balance of probabilities that, as a result of the debt burden voluntarily assumed by it, Sunset Beach was incapable of trading profitably and of meeting its financial commitments to its major supplier as and when they fell due. In my view, the conduct of the defendants in these circumstances was nothing short of reckless.

### *Summary*

78]To summarise thus far, and having regard to the cumulative effect of the

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<sup>36</sup> 1993 (1) SA 493 (A) at 504A–C.

<sup>37</sup> At 148B–E.

evidence discussed above, I am driven to the conclusion that, although the defendants attempted to obtain the advantages of the separate identity of the corporation, they operated the business of Sunset Beach as if it were their own and without due regard for, or compliance with, the statutory and bookkeeping requirements associated with the conduct of the corporation's business. When it suited them, they chose to ignore the separate juristic identity of the corporation. In these circumstances, the defendants cannot now choose to take refuge behind the corporate veil of Sunset Trading in order to evade liability for its debts.

79]It follows, in my view, that the plaintiff is entitled to a declaratory order in terms of s 65 of the Act, to the effect that Sunset Beach is deemed not to be a juristic person but, in respect of the plaintiff's claim herein, a venture of the defendants personally. It follows, further, that the defendants should be held liable jointly and severally to the plaintiff for whatever amounts Sunset Beach owed the plaintiff at the date of liquidation.

### *Quantum*

80]With regard to the *quantum* of the plaintiff's claim, this belatedly became a major issue during the trial. Through a convoluted process of accounting, the defendants sought to cast doubt on the accuracy of the plaintiff's accounting

records. In my view, this was a futile exercise in the light of my finding regarding the assignment of the debt to Sunset Beach.<sup>38</sup> Even though there may have been instances during the transition period (after the takeover of the business of Zaki Meat by Sunset Beach) where invoices previously issued to Zaki Meat may have been re-issued to Sunset Beach, this has been adequately explained by Mr Gaertner and does not, in my view, affect either the validity or the *quantum* of the plaintiff's claim in any way.

81]In any event, the amount of the plaintiff's claim had never been in issue before the trial – not during the negotiations between Mr Ebrahim Snr and Mr Gaertner; nor when Mr Ebrahim Snr (through his erstwhile attorneys) offered to pay the plaintiff an amount of R225 000 in response to its statutory demand for payment; nor during the application for liquidation of Sunset Beach; nor when a claim in that amount was duly admitted by the liquidator; nor during the defendants' evidence at the enquiry. In the circumstances, I reject the defendants' contentions in this regard and find that the plaintiff has proved on a balance of probabilities that the amount claimed herein was indeed the amount owing by Sunset Beach at the date of liquidation.

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<sup>38</sup> Para In the circumstances, I find that Sunset Beach knowingly and willingly accepted liability for the full outstanding debt of Zaki Meat. In these circumstances, it is clear to my mind that Sunset Beach was in fact liable for whatever amount was outstanding at the date of liquidation, irrespective of whether the original debt was incurred by itself or by Zaki Meat. above.

*Order*

82]For the reasons set out above, the following order is issued:

- (a) In respect of the plaintiff's claim for payment of the amount of R278 377.19, it is declared, in terms of section 65 of the Close Corporations Act 69 of 1984, that Sunset Beach Trading 232 CC t/a *Global Foods* (in Liquidation) is deemed not to be a juristic person, but a venture of the first and second defendants personally.**
- (b) The first and second defendants are declared to be jointly and severally liable to the plaintiff for the debts incurred by Sunset Beach Trading 232 CC t/a *Global Foods* (in Liquidation) to the plaintiff in the sum of R278 377.19.**
- (c) Judgment is granted in favour of the plaintiff for payment of –**

  - (i) R278 377.19;**
  - (ii) Interest on the aforesaid amount at the prescribed rate *a tempore morae* (from 29 March 2006) to date of payment;**
  - (iii) Costs of suit.**



83]\_\_\_\_\_

84]**B M GRIESEL**  
Judge of the High Court