IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: A274/2009

DATE:

12 MARCH 2010

In the matter between:

JOSE SIELI t/a DOWE NOOT APPELLANT

and

MR E POTGIETER 1st RESPONDENT

MRS N M POTGIETER 2nd RESPONDENT

MR J F ELFORD MUSIC CC 3rd RESPONDENT

JUDGMENT

BOZALEK, J:

The appellant initially sued first and second respondents in the magistrate's court, Bellville, for payment of the sum of R47 000, arising out of an agreement in terms of which it was averred that the respondents received 17 pianos on consignment from the appellant, sold eight thereof, but failed to make payment of the purchase price.

The magistrate dismissed the claim with costs and it is against this order that the appellant now appeals. First and second respondents were sued in their personal capacities. During the trial it emerged that the first and second respondents had been married to each other at the material time, but went through a protracted divorce at a time when this present dispute was reaching its conclusion. First and second respondents were furthermore 50% members of John Elford Music CC at all material times, The entity, through which the respondents conducted a business which, *inter alia* sold, repaired and hired out pianos.

Given the central role which the close corporation came to play and an additional cause of action related to the close corporation which the appellant now seeks to introduce on appeal, it is useful to consider how and when it was introduced into the action. Only the first and second respondents were initially sued by the appellant. At some stage prior to trial the close corporation was added as the third defendant. According to the particulars of claim, judgment was sought against all three defendants jointly and severally with no distinction being drawn between them in regard to the question of with whom the plaintiff or appellant had contracted or which party was responsible for the alleged breach of contract.

The appellant applied unsuccessfully for summary judgment against the first respondent who set out in his opposing affidavit that, what I shall refer to as the consignment agreement, might well in fact have been concluded with the close corporation, the third respondent. The first respondent also filed a special plea, averring that at all times he had acted in his capacity as a member of third respondent and thus could not be held liable personally.

Appellant succeeded in taking default judgment against the second respondent, which judgment was rescinded on her application. In her affidavit in support of the rescission application, the second respondent squarely set out her case as being that the consignment agreement was concluded with the close corporation and not her personally. It was in all probability for these reasons that the appellant added third respondent as a party to the proceedings. No pleadings were filed on behalf of third respondent, probably because sometime before trial it was placed into liquidation. Nor for that matter was the liquidator cited or, as far as one can see, notified of the appellant's claim against it.

The magistrate found that second respondent could not be held liable since she had contracted with the appellant in her capacity as a member and 50% shareholder of the close

corporation. He found further that first respondent could not be held liable, because on the evidence he had played no role at all in the conclusion of the agreement. The appellant sought to hold second respondent co-liable with the third respondent, the close corporation, for the outstanding monies on the basis of s 63(1)(a) of the Close Corporations Act, No. 69 of 1984, read with s 22(1) thereof. Together these sections provide, in certain circumstances, for the co-liability of a close corporation member where he or she uses the name of the corporation, but fails to add the abbreviation CC (or in Afrikaans "BK"). In this regard the magistrate held that since the particulars of claim had made no mention of this cause of action or ground of liability, the appellant was precluded from relying thereon.

The appellant, in its heads, has abandoned its appeal against the judgment handed down in favour of the second respondent. What remains is the appeal against the judgment against the first respondent. What remains is the appeal against the judgment in favour of the second respondent. There is no appearance today on behalf of the second respondent and nor were any heads of argument filed on her behalf. There is, however, no indication that the second respondent has abandoned the judgment which she obtained, or her opposition to the appellant's application to amend his particular of claim.

The appellant, represented by Mr Tredoux, has thus two preliminary applications. The first is for condonation for the late prosecution of the appeal. The delay involved was not great and the reasons therefor are both understandable and acceptable in the circumstances. Condonation should, in my view, be granted. The second application is, as I have indicated, for an amendment of the appellant's particulars of claim and the primary amendment sought is the introduction of an alternative cause of action against the second defendant in terms whereof she is to be held co-liable with the third respondent for the alleged non-payment on the basis of her omission or failure to add the abbreviation "CC" to its name when it was used in the consignment agreement, the terms of which were recorded in a consignment note.

The grounds cited in the affidavit, are those set out by Mr Tredoux in his heads of argument, and I shall deal with them in due course. The application is clearly borne of the realisation on the part of appellant that it cannot rely on the alternative cause of action in terms of s 63(1)(a) of the Act unless this is formally introduced into the issues which this Court can have regard to in determining the appeal. I should mention that this appeal was originally set down for hearing on 19 February 2010, but was postponed on that date by

agreement when the second respondent's legal representative came on record. By agreement the appeal was postponed until today with a timetable being set for the second respondent to file an affidavit opposing the appellant's application to amend his particulars of claim, and to allow second respondent to file heads of argument, both in relation to that application and the appeal as a whole.

Second respondent duly filed an opposing affidavit, but her legal representative withdrew on 10 March before any heads of argument were filed. There is today no appearance on behalf of second respondent, as I have mentioned, and Mr Tredoux pointed out that the legal representative's notice of withdrawal is defective. Nonetheless we have a full record of the second respondent's opposition to both the application to amend and the appeal, and in these circumstances consider that we can go ahead and hear the matter.

This Court has, in principle, the power in terms of section 22 of the Supreme Court Act 59 of 1959, to grant such an amendment as is sought, but as was held by a full bench of this court in Joles Eiendom (Pty) Limited v Kruger & Another 2007(5) SA 222 (C) at pg 230G, this power:

> "…. will be sparingly exercised and an amendment

> will only be allowed in cases where the Court is satisfied that the other side will not be prejudiced thereby. In order to satisfy this test, the party seeking an amendment on appeal must ordinarily satisfy the Court of appeal that the issues sought to be raised have been thoroughly canvassed in the Court below."

See in this regard Erasmus, Superior Court Practice, 1994, with loose leaf updates, Service 33 at A1-60, and Herbstein & Van Winsen, The Civil Practice of the Supreme Court of South Africa, 5th Edition, 2009 at 1249-1250 and the authorities there cited. The authors of Herbstein & Van Winsen add further at page 1249, that:

> "The general rule is that an amendment will be allowed only in cases in which the issues have been thoroughly canvassed in the court below. The Court of Appeal will allow an amendment of the pleadings in the court of first instance, so as to introduce an entirely new cause of action and will give judgment on it only when it is satisfied that the evidence before it fully approves the new cause of action and that no other evidence would have been led in the court of first instance, had the issue been

raised there, which might have led to a different conclusion on that issue."

The inquiry in this matter is then whether the issues sought to be raised were thoroughly canvassed in the court below and that must, of course, turn upon an examination of the issues and how they were approached or dealt with by the parties at the trial. Mr Tredoux contends that the case relating to section 63 was properly covered in evidence and it is unnecessary for the Court to remit the matter for further evidence or rehearing. That is his main argument.

He submitted that there were three additional reasons why the amendment should be granted. He set these out in the heads as follows. Firstly, the legal representative who represented the plaintiff was arrantly inexperienced. Secondly, a grave injustice will be done if the plaintiff is not permitted to correct the inept decision not to amend at the trial. Thirdly, the case which amendment seeks to cure is simply the omission to expressly rely on section 63(1)(a) of the Act. In other words the subject matter sought to be introduced by the amendment was fully canvassed at the trial.

The reason relating to the alleged ineptitude of the appellant's legal representative can, in my view, safely be ignored since to

give any weight to such a factor in circumstances such as these will be to open a veritable Pandora's box. The question of an injustice being done must be viewed through the prism of the established test, since any decision to allow a late amendment could potentially do an injustice to the opposing party. Similarly, the third reason, that an amendment simply cures the omission to rely on s 63(1)(a), is no reason at all, but only a restatement of the essential problem which the appellant faces, namely that its particulars of claim in no way apprise the second respondent that this is the case, or an alternative case, which she was required to meet.

It is so that the parties raised from time to time the s 63(1)(a) issue. The record reveals that the appellant's representative sought to rely on the alternative cause of action at an early stage in the trial. While leading the plaintiff he quoted the relevant provisions of the section. This was immediately met with an objection from the respondent's representative in the following terms:

> "Thank you Your Worship....I object to the introduction of this as any course(sic) of action of any basis of the claim, in fact if the plaintiff is going to rely on section 63 of the Close Corporations Act that had to be specifically pleaded with the

circumstances in the particulars of claim....so I will allow the plaintiff to carry on without objecting but if this has become the course(sic) of action then the Defendants are going to object, as the Court pleases."

The appellant's representative was then asked in terms by the magistrate whether he relied on s 63(1)(a) as a cause of action in the following passage:

"COURT: Yes Mr McKenzie do you rely on this section as one of course(sic) of action in the matter....Do you quote the section, Section 63 as a course(sic) of action or not as just part of your argument?

MR MCKENZIE: It is part of the argument Your Worship."

These exchanges, in my view, admit of no other interpretation, but that appellant's legal representative no longer sought to rely on this cause of action, either in the main or in the alternative. I am strengthened in this view not only by the magistrate's finding that the appellant was not entitled to rely on this cause of action but also by the stance taken by the respondent's representative in argument before the trial court.

The arguments of the representatives are contained in the record and contain a passage from the respondent's representative in which he makes it clear that his position remained that such issue, and other issues relating to alleged omissions in terms of the Close Corporations Act, were not pleaded by the appellant and could not be relied upon by him.

Mr Tredoux's argument goes further, however, and is that the case relating to section 63 was nonetheless fully canvassed in evidence, *inter alia*, in the appellant's cross-examination. It is indeed so that the question of the form in which the name "John Elford" appeared in the consignment note was touched upon at various stages, including plaintiff's cross-examination and second respondent's evidence. However, the question of the form in which the consignment note was cast or to whom it was addressed was highly material to the question of whether the first and the second respondents had contracted personally and as such had to be addressed, irrespective of whether the s 63(1)(a) claim was pleaded or not. The party with which the appellant was contracting was described by him in the consignment agreement which he drew up as "John Elford c/o Magda Potgieter", and otherwise referred to therein as the customer.

The citation of part of the third respondent's name, c/o the

second respondent coupled with the appellant's evidence that he contracted with the second respondent personally and her insistence that she contracted on behalf of the close corporation, inevitably led to a close focus on the significance of the name "John Elford" in the consignment note. It does not follow, however, that the entire issue of the omission of the abbreviation CC from the consignment note, and it's implications for third respondent's personal liability in terms of s 63(1)(a) of the Act, was thoroughly canvassed in the trial, particularly seen against the outcome of the objection initially raised by respondent's representative to appellant's reliance on the alternative cause of action.

It is also so that other evidence emerged during the trial which would, in the ordinary course, have a bearing upon a claim based on s 63(1)(a) such as second and third respondents' status as members, their respective duties and how the CC identified itself by signage. But this evidence was also material to the anterior question of whether the agreement was concluded between appellant and the second respondent personally or the CC. The fact, thus, that this evidence exists on the record does not necessarily mean or imply that the parties placed all the evidence which they would have had the alternative cause of action been pleaded, let alone that they conducted or presented their cases on this basis.

Mr Tredoux contended further that the three elements necessary for such an action to succeed were in effect dealt with thoroughly or were common cause. These elements were the use of the name of the close corporation without the abbreviation CC, culpable conduct on the part of the member and that the contracting party must not have been aware of the fact that he was dealing with a close corporation. To this last element can be added that a causal link between the appellant's alleged ignorance and the omission of the abbreviation has to be established; in other words that, in the circumstances of this matter, notwithstanding the omission of the abbreviation, the appellant, when he drew up or presented the consignment note to third respondent in the close corporation's business premises after the pianos had been delivered, remained unaware that he was dealing with a close corporation.

I am by no means in agreement that the first two elements were common cause. For example, in proving the first two elements the question of in what circumstances a member has a responsibility to correct another party's erroneous documentation looms large. Apart from this, the third element, the circumstances in which the agreement was drawn up and signed, appears to have been, potentially at least, a fruitful

one for cross-examination and the leading of evidence by the second respondent. Such evidence, relating, *inter alia*, to the close corporation signage on its vehicle and on its premises, appellant's insistence on using his consignment note rather than the close corporation standard form, although touched upon, can in my view by no means be said to have been thoroughly canvassed. This is not surprising, given the terrain upon which the trial was fought following the attempted introduction of the alternative cause of action and the objection thereto. There is, in my view, no knowing how second respondent would have presented her case had the s 63(1)(a) cause of action been pleaded or the objection not sustained.

These considerations are raised by the second respondent's legal representative in the opposing affidavit he filed in response to the appellant's application:

> "Indien die applikant die eerste geleenthede gebruik het om hierdie aansoek te bring, wat vir hom toe reeds beskikbaar was en die aangewese ding was om te doen, was die Respondente in 'n veel beter posisie om daarop te reageer. Die hele gang van die verhoor sou daardeur verander gewees het. Die Respondente sou eerstens die aansoek

onopponeer, toegegee soos nou ook hulle reg is, en selfs indien die wysigings toegelaat is, het daar meer deure vir die Respondente oopgegaan. Die Respondente sou dan 'n geleentheid gehad het om nader besonderhede aan te vra op die gewysigde Besonderhede van Eis, waarna hulle in hul onderskeie Verweerskrifte volledig kon pleit op die nuwe inligting. Blootlegging sou meer volledig gewees het aan die Respondente se kant, en sou, byvoorbeeld, die tipiese vorm wat die derde respondent gewoonlik gebruik het vir die tipe ooreenkomste, "Consignment Agreement Form", sekerlik blootgelê gewees het en gebruik word in die verhoor. In kort, die verhoor sou wesenlik anders verloop het."

In my view there is weight in these views. Further, in my view, the appellant has failed to establish that the issues arising from that case were thoroughly canvassed in the trial and thus that the third respondent will suffer no prejudice should appellant be allowed to amend these pleadings on appeal and seek judgment in terms of the alternative cause of action as the evidence presently stands, As a fallback position, Mr Tredoux indicated that the appellant was content to let the matter be referred to the magistrate's court for the hearing of

further evidence. He conceded, in argument, that the appellant would at least, in those circumstances, be liable for the wasted costs occasioned by such a step.

The second respondent points out that the only way the alternative cause of action can be canvassed is by the hearing of further evidence or the entire rehearing of this case. In this case, it is said on her behalf, that either such step is neither necessary or justified nor fair nor reasonable. I am of the view that this objection is well founded. The second respondent has been put through the trouble and expense of a trial in the magistrate's court plus an appeal and now faces a rehearing of the matter, or at best another mini trial dealing with a new cause of action. The fundamental reason for this is the appellant's failure to amend his pleadings to include the additional cause of action prior to or even during the initial trial, and this in circumstances where his representative made a clear election not to do so.

I do not consider, furthermore, that even a cost order in favour of the second respondent will remedy the prejudice which she will suffer should the matter be remitted back. The principles applicable when a party seeks the admission of further evidence on appeal, either by the Court of Appeal or by remittal to the court *a quo,* are summarized in Herbstein & Van

Winsen, Volume 2, page 1240:

"Where, however, remittal is asked for by a party who has failed, despite having had the opportunity to do so, to produce any evidence, or any legally admissible evidence, or all the evidence available on a point that was plainly in issue, the application will usually be refused. The principles applied in deciding whether to allow a party to place further evidence before a Court of Appeal are as follows:

1. It is essential that there should be finality to a trial and therefore if a suitor elects to stand by the evidence which he adduces, he should not (later) be allowed to adduce further evidence unless the circumstances are exceptional.

2. The party who makes the application must show that the fact that he has not brought further evidence forward was not attributable to any remissness on his part....

3. The evidence tendered must be weighty, material and presumably worthy of belief and must be such that, if adduced, it will be practically conclusive.

4. If conditions have so changed that the fresh

evidence will prejudice the opposite party, the Court will not grant the application, for example if the witnesses for the opposite party have been scattered and cannot be brought back to refute the fresh evidence."

It is not necessary, in my view, to consider the weightiness or credibility of the evidence, or even the question of the prejudice to the second respondent in any detail, since the application does not surmount the first two hurdles it must clear. There is such a thing as the tyranny of litigation and in my view a decision to allow the reopening of a trial in these circumstances, notwithstanding any cost order, would raise that spectre. For these reasons I consider that the application to amend the appellant's pleadings should fail, with the result that the appeal must be determined on the pleadings and the record as they stand.

That in effect leaves appellant's case as being that he contracted personally with the second respondent. There are powerful indications that this was not the case. In the first place the consignment note referred to the customer as "John Elford c/o Magda Pretorius" and was signed and, therefore, approved by her. The sequence of the names suggest that the primary contracting party was John Elford. It was common

cause that this had been the name of the business for many years prior to the third respondent purchasing it from the eponymous Mr John Elford. Apart from the omission of the abbreviation in circumstances which were not fully canvassed in the trial, there was little, if anything, to suggest that second respondent had contracted or would have wanted to contract in her personal capacity.

The music business was conducted by first and second respondents under the name of the CC, using that name on stationery at separate business premises, with signage proclaiming that name and using at least one vehicle with similar signage. In her written dealings with appellant or his legal representative after the dispute arose, second respondent was quite open about the business being conducted through the vehicle of the close corporation. One cannot escape the impression that notwithstanding his long experience in the music business, the appellant was, initially at least, careless as to the exact nature of the entity with which he was doing business. In my view the magistrate was correct in finding that the appellant failed to discharge the onus of proving that he contracted with second respondent in her personal capacity.

For these reasons I consider that there is no merit in the

appeal and would dismiss the appeal with costs, excluding the costs incurred on 19 February and the costs of the hearing of the appeal on 12 March 2010.

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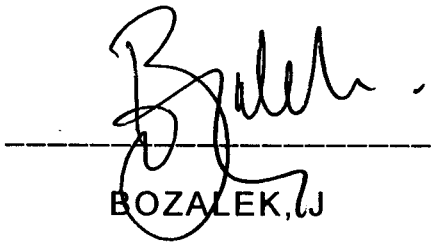

BOZALEK, J

CLEAVER, J: I agree. It is so ordered.

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CLEAVER, J