IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 12872/09

In the matter between:

BASFOUR 121 CC Plaintiff

And

M & R INTERIOR CONCEPTS CC First Defendant
(Registration Number: 2003/029423/23)

ANTHONY JACOBUS MEYER (in sequestration) Second Defendant

BRIAN GEORGE RODFORD (in sequestration) Third Defendant

JUDGMENT DELIVERED ON 22 APRIL 2015

BOQWANA, J

Introduction

[1] On 26 June 2009 the plaintiff instituted a damages claim for breach of contract against the defendants, for payment in the amount of R2 149 464.31 with interest at the rate of 15.5%, claiming against the defendants jointly and severally. Judgment was granted against the first defendant on 13 June 2014. I deal with the

circumstances leading to the separation of the claim and the granting of the judgment against the first defendant more fully below.

[2] The plaintiff had entered into a building contract with the first defendant for alterations and reconstruction of a private residence, owned by the plaintiff, during the period of April 2008 and September 2008. The plaintiff seeks the court to effectively lift the corporate veil in respect of its claim against the second and third defendants, and hold them personally liable, jointly and severally in respect of the first defendant's obligations to the plaintiff.

[3] At the commencement of the trial the defendants were legally represented by counsel, Ms Fitzpatrick instructed by Adriaans Attorneys. The plaintiff had led evidence for over 10 days when the trial was postponed *sine die*. The matter was then scheduled for 30 May 2014 in order for the parties to discuss further conduct of the trial. Prior to that date, Ms Fitzpatrick informed me that she and the attorneys could no longer represent the defendants. They subsequently withdrew from the matter. On 30 May 2014, there was no appearance for the defendants. The plaintiff's legal representatives submitted proof that they had served the notice of set down to the first defendant's registered address, which property appeared to be vacant at the time. The court directed that the matter be postponed to 13 June 2014 and that service be effected once again by way of substituted service, amongst others.

[4] On 13 June 2014 there was again no appearance by the defendants. I was satisfied that the plaintiff had complied with the directions of the Court regarding service of the notice of set down pertaining to that date.

[5] The Court was made aware by the plaintiff's counsel that the second and third defendants were provisionally sequestrated on 30 April 2014 and that due to the provisional sequestration the present action against the second and third

defendants had to be stayed in terms of section 20(1) (b) of the Insolvency Act No. 24 of 1936[1] ('the Insolvency Act').

[6] The Court directed that the trial proceed against the first defendant only and postponed the plaintiff's action against the second and third defendants *sine die.*

[7] The first defendant was a defaulter by failing to appear when the trial was called.[2] In terms of Rule 39 (1) of the Uniform Rules of Court:

> '(1) If, when a trial is called, the plaintiff appears and the defendant does not appear, the plaintiff may prove his claim so far as the burden of proof lies upon him and judgment shall be given accordingly, in so far as he has discharged such burden. Provided that where the claim is for a debt or liquidated demand no evidence shall be necessary unless the court otherwise directs.'

[8] Further evidence was led on behalf of the plaintiff against the first defendant only for the purposes of finalising its claim and in particular the quantification thereof. Having listened to the evidence and Mr Hack who appeared for the plaintiff, the court granted judgment in favour of the plaintiff against the first defendant in the following terms:

> 8.1 Payment of R2 149 464.31 (two million one hundred and forty nine thousand four hundred and sixty four rand and thirty one cents);
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> 8.2 Interest from 4 March 2009 to date of payment at the rate of 15.5% per annum;
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> 8.3 Costs to stand over for later determination;

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[1] '20 Effect of sequestration on insolvent's property
(1)
(b) to stay, until the appointment of a trustee, any civil proceedings instituted by or against the insolvent save such proceedings as may, in terms of section twenty-three, be instituted by the insolvent for his own benefit or be instituted again the insolvent: Provided that if any claim which formed the subject of legal proceedings against the insolvent which were so stayed, has been proved and admitted against the insolvent's estate in terms of section forty-four or seventy-eight, the claimant may also prove against the estate a claim for his taxed costs, incurred in connection with those proceedings before the sequestration of the insolvent's estate.'

[2] See *Katritsis v De Macedo 1966(1) 613 (AD*)

8.4 The hearing of the claim of plaintiff against the second and third defendants is postponed.

[9] The matter was set down to 31 October 2014 for hearing of the claim against second and third defendants, following a notice given on behalf of the plaintiff in terms of section 75 of the Insolvency Act. It was thereafter postponed to 28 November 2014 following an agreement between the parties, after a request from the Trustees of the insolvent estates of the second and third defendants. The Trustees delivered their notice of intention to defend the matter on 25 November 2014.

[10] On 28 November 2014, the Trustees applied for the postponement of the matter on the basis that they needed to ascertain whether to defend the matter. The Trustees placed on record as representing the insolvent estates of the second and third defendants were Stephen Malcolm Gore, Helgard Muller, Meiring Terblanche and Yunus Aboo Baker Ismail. The matter was accordingly postponed to 12 December 2014. It is apparent from the affidavit in support of the application for postponement filed by the Trustees that the second and third defendants were finally sequestrated on 12 June 2014.

[11] On 12 December 2014, Counsel for the Trustees, Ms Adhikari, indicated that the Trustees would defend the claim against the second and third defendants. The plaintiff commenced with the leading of its evidence against the second and third defendants. The matter was adjourned to 09 February 2015 for further hearing. Prior to that date, I was notified by Ms Adhikari, accompanied by Mr Hack for the plaintiff that the Trustees no longer wished to pursue their opposition. A notice of withdrawal of opposition was accordingly served on 02 February 2015.

[12] Action against the second and third defendants continued unopposed. Further evidence was led by the plaintiff until it closed its case.

Evidence against the first defendant

[13] Before I deal with the claim against the second and third defendants, it is perhaps important to outline in brief the facts and the evidence which was led resulting in the granting of the judgment against the first defendant.

[14] Extensive evidence was led by Gary Nathan ('Nathan'), Neil Sachs ('Sachs'), Douglas Richard Sparks ('Sparks') and Nicholas Taylor ('Taylor') on behalf of the plaintiff against the first defendant. Evidence consisted of a substantial body of documentary evidence contained in exhibits comprising, *inter alia*, emails, quotations, invoices, spreadsheets, payments, expert reports, and building plans.

[15] Nathan testified regarding an agreement that the plaintiff had with the first defendant in terms of which the first defendant would carry out alterations and renovations to the plaintiff's immovable property situate at 15 Blair Road, Camps Bay ('the property').

[16] At the time the contract was concluded the plaintiff was represented by Nathan and his wife, Sharin Nathan, and the first defendant was represented by Anthony Meyer, the second defendant. Sharin Nathan is the sole member of the plaintiff. The plaintiff was however mainly represented by (Gary) Nathan at all material times, in all dealings regarding the execution of the contract with the first defendant and its representatives. The second and third defendants were at all relevant times members of the first defendant.

[17] The first defendant was also contracted to render architectural and/or drafting services in accordance with written quotations. Such quotations contained the initial scope of work and services and the remuneration to be paid to the first defendant.

[18] It was alleged by the plaintiff that the first defendant expressly, alternatively impliedly, or alternatively tacitly, agreed: to perform the work in a professional and proper workmanlike manner to completion; to use the materials suitable for the

purpose of the works and free of defects; and/or that the works would be fully operational and/or usable for the purpose for which it was intended upon completion of the work.

[19] Nathan testified that the first defendant commenced work on or about March 2008. It however breached its obligations during late December 2008 and /or January 2009 by simply abandoning the site and ceasing to carry out any further work. Despite demand from the Nathans on behalf of the plaintiff, it refused to complete the work as agreed.

[20] The first defendant breached its obligations further by not providing the drawing details, and by failing to execute the work or render services in a professional or a proper workmanlike manner as agreed between it and the plaintiff. The work it did up to the point it ceased to work was found to be defective resulting in the plaintiff incurring huge costs to complete the building and repair the defects. Other additional costs were incurred including costs of alternative accommodation. The first defendant refused to remedy its breach.

[21] Nathan led the Court through various quotations, variations to the scope of work, emails written between him and the representatives of the first defendant, amongst others, including a certain Paul Johnston, and one Richard Lane ('Lane') during the course of 2008 and 2009. Such emails outlined the agreement as quoted, payments that had been made in terms of the quote, and additional payments made upon demand from Meyer and Johnston. Furthermore, such emails revealed changes to the plans and the fact that Nathan was frustrated due to lack of progress and that he had to pay sub-contractors that had not been paid by the first defendant and that the first defendant had abandoned the site refusing to continue with the construction work or rectify the defects that were identified. Discussions regarding the proposed renovations started in October 2007 but the quote was only obtained from the first defendant in April 2008. The parties agreed on a fixed price of R 4 210 768.00 made up of the initial contract sum of R 2 499 800.00 and an additional sum of R1 710 968.00. Performance of all the items was included in the fixed

price. The scope of work was varied by agreement and the contract sum was increased by R 411 603.71. Certain works were further omitted by agreement reducing the contract sum by R699 703.79. The final contract sum that the plaintiff would have to pay was R 3 922 667.92. The first defendant's representatives kept asking for more money despite payments that had already been made and without showing any progress on the construction site. These requests for more money were made after the final price was agreed upon.

[22] The plaintiff had paid a total sum of R 3 017 120.00 to the first defendant and a sum of R145 000.00 to a sub-contractor, Lane, which totalled R 3 162 120.00 at the time of the breach of contract. The plaintiff would have to pay the sum of R 1 919 527.31 to the replacement contractor as the cost necessary to complete the work that the first defendant failed to complete. The total cost to plaintiff was R 5 081 647.31.

[23] The plaintiff suffered damages in the amount of R 2 149 464.31. The amount claimed by the plaintiff represented cost of completion of work, cost of remedying the defects, overpayment, additional costs and costs occasioned by the delay resulting in plaintiff incurring costs for leasing alternative accommodation.

[24] The expert witnesses, being Sachs, Sparks and Taylor, gave a clear and comprehensive account on the nature of the claim and on how it was calculated and quantified. Sachs, an architect, testified about the nature of the incomplete and defective work requiring completion and/or rectification. He gave evidence regarding items that had to be completed and remedial work that needed to be done on defective work that he observed with Sparks.

[25] Sparks, a quantity surveyor, gave evidence about the cost of various individual items requiring completion and/or rectification and confirmed the accuracy of the calculations set out in the plaintiff's particulars of claim based on fair and reasonable costs of labour and material in 2009.

[26] Taylor, a chartered accountant, testified that the amount claimed in respect of the alternative accommodation was fair and reasonable in and during 2009.

[27] I was satisfied with all the evidence led on behalf of the plaintiff and granted judgment in favour of the plaintiff against the first defendant in terms of Rule 39 (1) of the Uniform Rules of Court.

Claim against the second and third defendants

[28] The plaintiff claimed that the second and third defendants were personally liable for the damages suffered by the plaintiff in that they infringed various provisions of the Close Corporations Act[3] ('the Act'). Firstly, they have failed to keep proper accounting records as required by section 56 of the Act. Secondly, they failed to cause financial statements to be made out and are therefore in violation of section 58 of the Act. Thirdly, they have failed to have an accounting officer in terms of section 59 of the Act and are therefore liable in terms of section 63 of the Act. Fourthly, they have conducted the business of the first defendant recklessly, fraudulently and with gross negligence and are therefore liable in terms of section 64 (1) of the Act. Fifthly, they have grossly abused the separate juristic personality of the first defendant and are therefore liable in terms of section 65 of the Act.

Evidence against second and third defendants

[29] Nathan was called as an expert witness to give evidence on behalf of the plaintiff against the second and third defendants. I raised an issue of whether Nathan's evidence could be viewed as being objective for the reason that he was involved in all dealings on behalf of the plaintiff with the defendants, was attached to the plaintiff, had an interest in the matter and also gave evidence on behalf of the plaintiff in the claim against the first defendant.

[30] Mr Hack's response was that the evidence that Nathan gave was exclusively in regard to hard and cold facts which was supported by documentary evidence consisting of, amongst others, bank statements. This documentary evidence was the result of his personal investigations. A firm of forensic accountants, Accounts-

[3] Act No. 69 of 1984

at-Law, assisted the plaintiff in putting the data collected by Nathan into a spread sheet. Mr Hack submitted that the Court was able to come to its own conclusions on the facts and the law as they were presented; it need not rely on Nathan's opinions. He submitted that the opinions to be formed are not of a technical, scientific or abstract nature, they are matters of commercial practice and law. The issue was about the second and third defendants' non-compliance with the law. I am satisfied with Mr Hack's response.

[31] Nathan's evidence in short was as follows. He holds a BSc degree in Computer Science. He is currently a Chief Executive Officer at Oro Africa Limited. He has extensive experience and knowledge in corporate governance, company and business management procedures, reading and understanding of financial statements, banking transactions, identification of movement of assets and liabilities from financial records and in matters relating to the Value Added Tax (VAT) and other taxation laws and procedures applicable to individuals and corporate entities. He actively participated in all preparations for trial. He identified documents that were required to be discovered by the defendants during numerous requests.

[32] He personally analysed documents in exhibit E and consulted Accountants – at–Law, with whom he conducted investigations into the conduct of the first defendant. The data search related to the first defendant, its members, accounting officer, bookkeeper and the property renovations or improvements. They reviewed 22 months of bank statements for the first defendant from January 2007 to October 2008, various email correspondence, certain Nedbank payment confirmations, supplier invoices, the corporation founding statements, accounts receivables, annual general meeting minutes, provisional tax and VAT returns, the VAT application, the Tomar Trust lease agreement, a list of properties and equipment and pleadings relating to the matters.

Failure to keep the books

[33] As regards the second and third defendants' failure to keep proper books of account, Nathan testified that the first defendant had never had accounting records since its inception in 2003. The plaintiff filed numerous applications for discovery of various accounting documents. The defendants failed to respond until an application to strike out the defence was brought. The defendants responded by saying they did not have the documents requested in their possession except for two. A question was posed in the plaintiff's request for further particulars whether the first defendant provided the second and third defendants with remuneration and, if so, what the amount and the nature thereof were. The answer given was that the second and third defendants' sources of finance were profits derived from contracts undertaken by the first defendant; they were members of the first defendant; the first defendant did not provide regular remuneration but merely profits realised at the conclusion of the contract and that the sums were irregular and varied.

[34] Upon the plaintiff filing an application to compel compliance in terms of Rule 35(7), the defendants filed an undated and unsigned affidavit. Ten documents were provided. The first eight documents are referred to as minutes and further annual meetings of members for the period of 2003 up to 2010. According to the plaintiff, although purporting to have been created and signed in successive years, they appear *ex facie* to have all been manufactured at one time. Nathan testified that the documents are false and they contain information regarding alleged financial statements and appointment of financial officers which is untrue. The documents titled **Consolidated Income and Expenditure Statement Extracted for Legal Purposes purporting to be for the years 2008 and 2009** are false because they are not extracted from any financial statements. After many years of either being evasive, not telling the truth or manufacturing evidence, the defendants finally admitted during the trial, upon being asked by the court to answer, that the financial records or books of accounts requested did not exist.

[35] Section 56 provides, *inter alia*, as follows:

'56. Accounting records

(1) A corporation shall 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, including-

(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: Provided that in the case of a corporation which has been converted from a company in terms of section 27, the existing fixed asset register of the company shall be deemed to be such a register in respect of the corporation, and such particulars therein shall be deemed to apply in respect of it;

(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.'

[36] I am satisfied that there is no evidence to show that any accounting records were kept as required by section 56 of the Act. As was stated in **Airport Cold Storage (Pty) Ltd v Ebrahim and Others**[4], '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

[4]2008 (2) SA 303 (C)

the corporation.''[5] The failure to meet such requirements is borne out by the roundabout and evasive conduct of the defendants when requested to discover further documents. It can indeed be concluded that the **'Consolidated Income and Expenditure Statement Extracted for Legal Purposes'** purporting to be for the years 2008 and 2009 presents a fabrication as it is not supported by any financial statements and in certain respects contradicts bank statements.

No accounting officer

[37] In regard to the non-compliance with sections 59 read with 63(h)[6] of the Act, Nathan testified that despite fraudulent attempts by the defendants to make it appear as if there was an accounting officer, in reality there has never been an accounting officer since at least 1 March 2007. Although Adele Candance Kirsten's name was given to the Companies and Intellectual Property Registration Office as that of the first defendant's accounting officer when it was first registered, there is no evidence that duties of an accounting officer were ever performed. Kirsten herself confirmed in her resignation letter that the duties of an accounting officer were never performed. Furthermore, Nathan received a letter dated 6 June 2007 from CIPRO during his investigations purporting to come from Mitton & Co accepting appointment as accounting officer since inception of the close corporation. Mitton & Co is a trading name for a sole practitioner, Stephen John Heiberg, who practises as a registered accountant and auditor. Heiberg denied ever meeting with the first and second defendants or having had any dealings with the administration affairs of the first defendant.

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[5] *Airport Cold Storage (Pty) Ltd v Ebrahim and Others* supra at para 31

[6] Section 63 (h) states as follows:

'**63. Joint liability for debts of corporation**

Notwithstanding anything to the contrary contained in any provision of this Act, the following persons shall in the following circumstances together with a corporation be jointly and severally liable for the specified debts of the corporation:...

(h) where the office of accounting officer of the corporation is vacant for a period of six months, any person who at any time during that period was a member and aware of the vacancy, and who at the expiration of that period is still a member, shall be so liable for every debt of the corporation incurred during such existence of the vacancy and for every such debt thereafter incurred while the vacancy continues and he still is a member.'

[38] It is submitted on behalf of plaintiff that the only conclusion to be drawn about the document is that it was done fraudulently.

Carrying on business of corporation recklessly, with gross negligence or fraudulently

[39] As regards section 64 (1)[7] of the Act, which provides that members are personally liable for the obligations of the corporation if they knowingly carried on the business of the close corporation recklessly, with gross negligence or fraudulently, Nathan made the following submissions: Firstly, the second and third defendants, amongst others, submitted nil returns for payment of provisional tax for the period of 2003 to 2008. This was notwithstanding the fact that the first defendant was busy with a number of projects as it appears from the accounts receivables. In respect of one year where it appears that tax was allegedly paid was 2009, the tax return was based on entirely fictitious figures in the so-called Consolidated Income and Expenditure Statement Extracted for Legal Purposes.

[40] Secondly, the consolidated income and expenditure statement showed huge expenditure for travel and telephone expenses, being R137 026.00 and R116 676.00 respectively. It also recorded a huge cost for directors' emoluments in the amount of R440 000.00 in spite of the fact that a close corporation has no directors and the defendants had stated in their reply to the requests for further particulars that the members received no remuneration. They stated that: '*The First*

[7] '**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 or 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 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.

(2) Without prejudice to any other criminal liability incurred where any business of a corporation is carried on in any manner contemplated in subsection (1), every person who is knowingly a party to the carrying on of the business in any such manner, shall be guilty of an offence.'

Defendant does not provide regular remunerations merely profits realised at the conclusion of the contract'.

[41] When the defendants were requested to give full particulars of remuneration, including monthly or weekly payslips and IRP5s provided to employees, as well as PAYE forms filed in terms of the Income Tax Act[8], the defendants' reply was that these documents are not relevant because all work was subcontracted. However, Nathan identified direct payments made to 14 people at R599 741 for the periods of 1 January 2007 to 20 October 2008.

[42] Thirdly, the defendants have defrauded SARS in respect of VAT, having issued VAT invoices and recovered VAT when the first defendant was not registered as a VAT vendor. On 14 October 2008, they issued an invoice to the plaintiff for payment of R81 878.00 together with VAT of R11 462.92. They only applied for VAT on 13 March 2009 but collected VAT at the time when the first defendant was not registered for VAT. In addition to that the defendants also defrauded SARS in respect of PAYE. They alleged that they had no employees but that all the work was done by subcontractors. The bank statements, however, showed payments in the form of 'salary'. It should then be concluded that the first defendant paid employees but failed to pay PAYE to SARS.

Abuse of juristic personality

[43] In regard to section 65 of the Act, the plaintiff alleges that the second and third defendants abused the separate juristic personality of the first defendant in a manner that can be described as egregious and appalling. Nathan testified that the second and third defendants represented themselves to the plaintiff as 'builders'; however, from the evidence gathered from the first defendant's website and records from the Deeds Office, the second and third defendants were in the business of buying and selling property. They did not buy property so they could add value to it and to accrue profit over the years; they bought properties to renovate or otherwise improve them and quickly re-sell them at a substantial profit.

[8] Act 58 of 1962

From this it appears that the second and third defendants created the first defendant with one goal in mind, namely, to use it to carry out building work, therefore saving them from employing independent builders or paying for the building work. Nathan gave evidence regarding the acquisition, value, improvements and selling of these properties. He analysed the bank statements that were discovered and the deeds office records regarding properties acquired and expenses incurred to renovate and /or improve them and when those properties were sold and for what amounts. The costs of these renovations were not paid by the second and third defendants, who took all the profits, but by the first defendant. The second and third defendants made profits at the expense of the first defendant. They each made between R14 million and R15 million over the last ten years whilst impoverishing the first defendant and its creditors in the process.

[44] Various examples of properties were provided which were purchased and resold in the manner set out above. One such example is Erf 26670, commonly known as No.7 Low Street, Observatory, which was purchased by the second defendant on 6 May 2005 from MFR Van Rooyen at the price of R900 000. The cost to improve this property was to the value of R24 181.72 which was paid by the first defendant. These payments are reflected in the business account 1011 1077082 for the period of February and September 2007. The property was sold for R 1 830 000.00 to CEP McKee who took transfer on 10 April 2008. The balance in the bank account of the first defendant at the time of transfer was R 7 889.28. Another example is Erf 25825, known as No. 31 Lytton Street Observatory, which was bought by both the second and third defendants on 9 February 2006 from a Bank for the amount of R795 000.00. The costs of improvement were paid by the first defendant in the amount of R28 075.04 for the period of February 2007 to January 2008 and the property was sold at R1 270 000.00 to R G Sunkel. Transfer took place on 13 March 2008. Other examples investigated by Nathan and provided to the court demonstrate a similar *modus operandi*.

[45] In regard to the project relating to the plaintiff's property, the plaintiff made payments to the first defendant. Examples are payments made on 20 and 21 May 2008 in the amounts of R500 000.00 and R750 000.00 respectively. At that time the balance in the bank account of the first defendant as reflected by the bank statements was R 2243.46. On 21 and 22 May 2008 an amount of R400 000.00 and R753 000.00 were debited to M*TT Ned Cons54212820008965669. The reason for this transaction is not stated. Numerous other transactions that were not accounted for ensued. Comparison between inflows and outflows was staggering. The plaintiff paid another R 1 000 000.00 in September 2008, at that time the balance in the bank account of the first defendant was R 4457.06. Small amounts were identified relating to the plaintiff's property. Monies were credited to various account numbers, with reasons not stated and to various projects owned by the second and third defendants. It appears that money was used to pay salaries, expenses and to subsidise other projects and not for the material and labour required to build the plaintiff's property. This occurred whilst the first defendant's representatives kept demanding more money from the plaintiff.

[46] It is submitted by Mr Hack that the conduct of the second and third defendants was indeed typical of controllers of a corporate entity abusing its separate corporate identity for their own personal advantage.

Discussion

[47] The plaintiff relies on various provisions of the Act in seeking a relief holding the second and third defendants personally liable for the first defendant's obligations. It relies on section 63(h), section 64 (1) and section 65.

[48] In terms of section 63 (h) of the Act:

> 'If the office of accounting officer is vacant for a period of six months, every member who at any time during that period is aware of the vacancy and who at the expiration of that period is still a member is liable for every debt of the cooperation incurred during

the existence of the vacancy, as well as for every debt incurred thereafter while the vacancy and his membership continues.' [9]

[49] As was found in **Airport Cold Storage** supra, '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.'[10] Kirsten clearly stated that no accounting duties were performed, at least from inception. Heiberg denied being an accounting officer or having performed any accounting work for the first defendant. In the circumstances the provisions of section 59 read with section 63 (h) were not complied with and therefore the provisions of section 63(h) imposing personal liability would apply.

[50] As regards section 64(1), I am satisfied that the second and third defendants carried the business of the first defendant recklessly, with gross negligence and with intent to defraud the plaintiff and other creditors in particular the receiver of revenue.

[51] In regard to the first submission, it can be reasonably concluded that the second and third defendants were not entirely truthful to the receiver when submitting nil returns for payment of provisional tax for all the years in question, except for one year, which return was also questionable, when numerous projects were undertaken by the first defendant during that period.

[52] As regards the second submission, I accept Nathan's testimony to the effect that either the defendants' reply in the pleadings was a lie or the reference to directors' emoluments of R440 000.00 was made with the intention to defraud the receiver of revenue of a significant sum. I am also persuaded by the submission that the two concepts (i.e. profits and emoluments) are entirely incompatible. According to Nathan, emoluments are salaries or fees or benefit from employment or office[11] deductible before taxation. Profits payable to members are what remain

[9]See the textbook, *Close Corporation and Companies Service*, edited by JJ Henning Volume 1 at page 6-9 paragraph 6.09, where this was stated.
[10]*Airport Cold Storage (Pty) Ltd v Ebrahim and Others* supra at para 38.
[11]Also see *Concise English Oxford Dictionary*, 11th Edition, Edited by Catherine Soanes and Angus Stevenson

after tax and after the corporation has properly decided what is available for distribution. The payments to members out of profits accordingly can never constitute expenses.

[53] It was stated by Nathan that for 2009 the defendants would have defrauded SARS in the amount of between R500 000.00 to R800 000.00 and if other years were included the amounts would run to millions of rands. I am satisfied that the alleged gross profit of R 4680.00 does not appear to be correct. The only reasonable conclusion to reach is that allegation is fraudulent, if one has regard to the R440 000.00 and the inflated travel and telephone expenses.

[54] If the defendants were correct that the first defendant had no employees, then why would there be payments made to certain individuals and recorded as 'Salary'. The inescapable conclusion is that the defendants deliberately lied in their replies for further particulars or requests to discover documents. They also failed to account for PAYE, VAT, UIF and other statutory obligations required when a corporation employs people. Evidence also bears out that they recovered VAT whilst not registered for VAT, thereby defrauding the receiver.

[55] It has been held that 'the object of the provision [s64] is not to create a joint and several liability between the delinquent director [member] and the company [corporation] in the interests of creditors. If the company cannot pay, the creditor is entitled to claim from the director without having to place the company in liquidation or under judicial management. This does not mean that the creditor has to excuss the company before proceeding against the director only that there must be evidence of the company's inability to do so.'[12] (Own insertion and emphasis)

[56] In **Tsung v Industrial Development Corporation of SA**[13] the Supreme Court of Appeal held that in a case where a company is 'hopelessly insolvent', a

[12] See *Saincic and Others v Industro-Clean (Pty) Ltd and Another* 2009 (1) SA 538 (SCA) at 546 A – B. The Court was considering section 424 of the Companies Act 61 of 1973 in this case but it held that for all intents and purposes that section was identical to section 64 of the Close Corporations Act. It referred to *L & P Plant Hire BK en Andere v Bosch en Andere* 2002 (2) SA 662 (SCA) at paras 39 and 40

[13] 2013 (3) SA 468 (SCA) at para 26

causal link between the fraudulent or reckless conduct, and the company's liability to pay its debt does not have to be established.

[57] In the present matter whilst judgment was granted against the first defendant in the first instance, it has become apparent that the first defendant would be unable to pay the plaintiff's debt as it has been stripped off its assets by the second and third defendants. Nathan demonstrated from the first defendant's bank statements that were discovered and from other documentation relating acquisition and selling of properties by the second and third defendants, that they used the first defendant to pay for expenses relating to their personal properties and to advance large sums of money to various unaccounted accounts. There was no evidence in the bank statements showing that the first defendant had received any proceeds relating to the properties sold nor was it reimbursed for expenses it paid on behalf of the second and third defendants. It is evident that the first defendant did not have assets to pay the plaintiff's claim. Secondly, the second and third defendants have been sequestrated. It was stated on affidavits requesting postponements by the Trustees that the second and third defendants were at one stage in Europe and then in Australia and could not be reached for trustees to obtain information in order to investigate their financial affairs.

[58] Turning to section 65. This section provides as follows:

> **'65. Powers of Court in case of abuse of separate juristic personality of corporation**
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> 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.'

[59] Gross abuse is not defined. In **Airport Cold Storage (Pty) Ltd v Ebrahim and Others**[14] at paragraph 12 Griesel J held that:

> 'The starting point is that veil piercing will be employed 'only where special circumstances exist indicating that it [i.e. the company or close corporation] is a mere façade concealing the true facts'. 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':
>
> '*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).* '[15]

[60] Piercing of a corporate veil is an exceptional procedure. In **Hulse-Reutter and Others v Godde**[16] the Court held as follows at paragraph 20:

> 'There can be no doubt that the separate legal personality of a company is to be recognised and upheld except in the most unusual circumstances. 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. (See *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd and Others* 1995 (4) SA 790 (A) at 803A-H).The circumstances in which a court will disregard the distinction between a corporate entity and those who control it are far from settled. Much will depend on a close analysis of the facts of each case, considerations of policy and judicial judgment. Nonetheless what is, I think, 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

[14] 2008 (2) SA 303 (C)
[15] Joubert (ed) *The Law of South Africa (LAWSA)* (first reissue) vol 4(1) para46
[16] 2001(4) SA 1336 (SCA)

> corporate entity and those who control it which results in an unfair advantage being afforded to the latter.' (Own emphasis)

[61] It is clear in my mind that most of the properties that were said to be projects of the first defendant were registered in the names of the second and third defendants, in their personal capacities either as individuals or as partners. Costs for improvements of these properties were paid by the first defendant. There is also no evidence that any of the proceeds of these sales of properties went to the first defendant as I have already indicated. Monies were transferred to various accounts which were unaccounted for. There are no records of any member loan accounts.

[62] In conclusion Mr Hack once again referred to the decision of **Airport Cold Storage (Pty) Ltd v Ebrahim and Others,** which was confirmed on appeal[17],where Griesel J held that:

> '[52] To summarise thus far, and having regard to the cumulative effect of the 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 entity of the corporation. In these circumstances, the defendants cannot now choose to take refuge behind the corporate veil of Sunset Beach Trading in order to evade liability for its debts.'

[63] The same views were shared by the appeal court.[18] Similarly, the totality of evidence in this case leaves me with no doubt that the second and third defendants used the separate identity of the first defendant to obtain its benefits, they operated the business in total disregard of the statutory requirements associated with conducting a close corporation. They cannot hide behind the first defendant's separate identity in order to escape liability for the first defendant's obligations.

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[17] *Ebrahim and Others v Airport Cold Storage (Pty) Ltd* 2008 (6) SA 585 (SCA). See *also Ex Parte application of Gore NO and Others 2013 JOL 30155 (WCC)* for a comparison between section 65 of the Close Corporation Act which requires 'gross abuse' and section 20(9) of the Companies Act which requires 'unconscionable abuse'.

[18] *Ebrahim and Others v Airport Cold Storage (Pty) Ltd* supra at 590C; 592A; 592H to 593E .

They failed to come clean when they were required to provide necessary documentary evidence to prove that they were conducting the business in a lawful manner. On many occasions they falsified or manufactured evidence for the purposes of complying with discovery requirements. Close scrutiny and analysis of various documents by Nathan clearly showed that the second and third defendants' conduct was not only *mala fide* but was also unlawful.

[64] The second and third defendants did not keep proper accounting records, they did not have an accounting officer, they paid monies to individuals and members whilst having claimed that the first defendant had no employees, they charged VAT whilst not registered as VAT vendor, they failed to give evidence that they complied with statutory obligations required of a person conducting a close corporation and who is an employer and they misrepresented their business to third parties such as the plaintiff. In the true sense they appeared to be 'property flipping'. They indeed abused the first defendant in their personal acquisition and sale of properties whilst using the first defendant to fund renovation expenses with substantial amounts of money.

[65] Their conduct explains why they kept asking for money from the plaintiff for the continuation of the project, when items agreed upon for the first phase were not even constructed or completed. It is reasonable to conclude that they used the monies received from the plaintiff to fund their other projects and grossly abused the first defendant's separate legal personality. Nathan's evidence was thorough, clear and logical. It was in all respects supported by documentary evidence. I have no reason to reject it.

[66] The Court is empowered to make a declaration that the corporation is deemed not to be a juristic person in respect of such rights, obligations or liabilities of the corporation when it finds 'gross abuse' of the juristic personality of the corporation as a separate entity.

[67] A question I had in my mind was what would be the effect of that declaration to the already existing judgment granted against the first defendant in

favour of the plaintiff. Having requested Mr Hack to address me on this issue I am satisfied that due to the first defendant's inability to pay the claim, the corporate veil can be lifted in terms of section 65 of the Act.

[68] In the circumstances, the plaintiff is entitled to the order it seeks against the second and third defendants that they be held personally liable for the claim that the plaintiff has against the first defendant. The second and third defendants therefore should be held liable jointly and severally to the plaintiff for the amount claimed.

Costs

[69] The issue of costs against the first defendant stood over for later determination. If a declaration deeming the first defendant not to be a juristic person for the purposes of the plaintiff's claim in terms of section 65 is made, a cost order against the first defendant would be of no use. Same applies if an order is made in terms of section 64 as it has been held that this provision does not create joint and severally liability between the corporation and its members. It also seems to me making an order only in terms of section 63(h) would be too narrow if one takes into account the various statutory infringements found in this matter.

[70] On the costs aspect, the plaintiff seeks costs on an attorney and own client scale. I have no doubt that the plaintiff has made out a case for a punitive cost order to be awarded against the second and third defendants. That is demonstrated by the evidence and findings above. It appears that the presiding view nowadays is that there is in fact no difference between the costs awarded on a scale as between attorney and client as opposed to a cost order granted on scale between attorney and own client.

[71] The Supreme Court of Appeal in **Thoroughbred Breeders' Association v Price Waterhouse**[19] questioned the existence of the difference between the two scales, but was reluctant to express 'a firm view' on whether an order as between attorney and own client was a competent one, leaving it for future consideration by

[19] 2001 (4) SA 551 (SCA) 596E–I.

that Court. It however held in passing that the full bench of this division had held a view in **Law Society of the Cape of Good Hope v Windvogel**[20] that an order for attorney and *own* client costs is not appropriate since it is not generically different from an order for attorney and client costs. It also acknowledged that there were contrary views in other divisions. It further noted that the SCA appears to have accepted in principle, in **Sentrachem Ltd v Prinsloo**[21] and **Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd and Others**[22], but without pertinent consideration, that an order for attorney and *own* client costs would in appropriate circumstances be competent.

[72] A decision that provides a thorough analysis on the question of costs on the attorney and client scale *vis a vis* an attorney and own client scale is that of **Aircraft Completions Centre (Pty) Ltd v Rossouw and Others**[23]. The Court in that case examined the relevant case law that dealt with this issue extensively and ultimately concluded that there was in fact no difference between the two scales[24]**.**I refer to paragraph 116 in particular where the Court held, *inter alia*, as follows:

> '..
>
> 8. Therefore, an order in the hybrid form that one party should pay the costs of another 'taxed as between attorney and *own* client', does not, as a matter of law, achieve anything more than an order in the established form that one party should pay the costs of another 'taxed as between attorney and client'. Equally, an agreement in the hybrid form takes the matter no further than an agreement to pay 'attorney and client' costs.
>
> 9. For all of these reasons, a Taxing Master is obliged to act on an order that one party is to pay the costs of another 'taxed as between attorney and *own* client' in exactly the same way as he is obliged to act on an order that one party is to pay the costs of another 'taxed as between attorney and client'. As a matter of law, there is no difference between them. Both orders are for a taxation on the intermediate basis in accordance with *Nel v Waterberg Landbouwers Ko-operatieve Vereeniging*.

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[20] 1996 (1) SA 1171 (C)
[21] 1997 (2) SA 1 (A) at 22B–D
[22] 1995 (4) SA 790 (A) at 807C–D
[23] 2004 (1) SA 123 (W)
[24] In doing so approving the Western Cape decision of *Law Society of the Cape of Good Hope v Windvogel*

10. It follows, in my respectful view, that, although costs are a matter within the discretion of the Court, that discretion does not extend to the power of creating a new basis of taxation previously unknown to the law. If any need for a new basis of taxation should emerge (as I do not think has occurred), it would be a matter for the legislature, or perhaps the Rules board, to remedy.'

[73] The approach followed in the Aircraft decision was supported by the Land Claims court in the judgment of **Quinella Trading (Pty) Ltd and Others v Minister of Rural Development and Others**[25]**.**

[74] I align myself fully with the reasoning and hyphothesis followed by Stegmann J in the **Aircraft Completion** case that as a matter of law, an order that the defendants should pay the plaintiff's costs 'taxed as between attorney and own client' would not achieve anything more than an order in the established form that one party should pay the costs of another 'taxed as between attorney and client'.

[75] In the result I make an order in the following terms:

1. In respect of the plaintiff's claim for payment in the amount of R2 149 464.31, it is declared that in terms of section 65 of the Close Corporations Act 69 of 1984, M & R Interior Concepts CC is deemed not to be a juristic person.
2. The second and third defendants are declared to be jointly and severally liable to the plaintiff for the debts incurred by the first defendant to the plaintiff in the sum of R2 149 464.31.
3. Judgment is granted to plaintiff for the payment of -

   3.1 R2 149 464.31.

   3.2 interest on the aforesaid amount calculated from 4 March 2009 to date of payment at the rate of 15.5% per annum.

   3.3 costs of suit, including all costs of qualifying experts, preparation and attendance at court of plaintiff's expert witnesses and all costs of

[25] 2010 (4) SA 308 (LCC) at paragraph 33

interlocutory applications where costs stood over for later determination, all costs on an attorney and client scale.

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N P BOQWANA

Judge of the High Court

APPEARANCES

FOR THE PLAINTIFF: Adv B Hack

Instructed by: Knowles Husain Lindsay Inc., Cape Town

FOR THE FIRST, SECOND AND THIRD DEFENDANTS: No appearance