IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NUMBER: A342/2014

DATE: 9 SEPTEMBER 2016

In the matter between:

TRI-OPTICS CC T/A WOLFE ELEKTRIES	1st Appellant
ALTHEA WOLFE-COOTE	2nd Appellant
MATHEW WOLFE-COOTE	3rd Appellant
and	
LIONEL GERICKE	Respondent

EX TEMPORE JUDGMENT

ROGERS J:

[1] We have before us an appeal against an order from the court *a quo* in which the magistrate made a declaration in terms of s 65 of the Close Corporations Act 69 of 1984 deeming the first respondent, which I shall refer to as the close corporation, not to be regarded as a close corporation in regard to its rights and obligations and upholding an application against all three of the present appellants, the

effect of which was to make the second and third appellants (the second and third respondents a quo) personally liable for a judgment which the present respondent (the applicant in the court a quo) had obtained against the close corporation on 25 June 2012 for R74 447.

[2] Mr Claasens appeared this morning for the second and third appellants and Mr Fergus for the respondent.

[3] The second appellant, to whom I shall refer by her first name Althea, was at all material times the sole member of the close corporation. The third appellant, to whom I shall refer to as Mathew, is her son and the person who according to the appellants has conducted the business with which are concerned, Wolfe Electrical, since about March 2011.

[4] Very briefly, the facts are that the respondent, to whom I shall refer as Gericke, issued summons against Wolfe Electrical, the business then conducted by the close corporation, in March 2011. This gave rise to the judgment to which I have referred in June 2012. Costs were subsequently taxed but when Gericke attempted to levy execution in February 2013 the return of service indicated that the business of Wolfe Electrical no longer existed.

[5] Gericke's attorneys were subsequently notified by attorneys acting for the current appellants that the close corporation had been placed in final liquidation during April 2013. This caused Gericke in May 2013 to launch his application for relief in terms of section 65.

[6] The founding affidavit in support of this relief, in which initially only the business of Wolfe Electrical and Althea were cited as respondents, was extremely terse. Apart from briefly describing the procedural history, Gericke said no more than that he was of the opinion that Althea had abused the corporate personality of the close corporation because she was still conducting business under the name Wolfe Electrical, a fact ascertained telephonically by Gericke in a phone call that he made to the business on 14 May 2013. He also said that the vehicles of the business were still in use under the name Wolfe Electrical. He attached photographs.

[8] Althea opposed the application. She alleged that the close corporation had ceased trading in March 2011. She had been the sole member. Subsequent to the cessation by the close corporation of its business, her son Mathew had started trading under the name Wolfe Electrical as sole proprietor. She said she had no interest whatever in Mathew's business which was a different business. She denied any abuse of the close

corporation's corporate personality.

[9] Gericke in reply supplied a significant amount of new material in support of his application. He seems to have accepted for purposes of his application that the close corporation had ceased business in March 2011, rather than in 2012 as he had thought previously, but he said among other things that the business had essentially carried on as before, that it was being conducted by Mathew with the same logo, that the business had the same telephone number, fax number, email address, post box number and used the same vehicles. He alleged that the business continued to employ the same personnel.

[10] He also alleged that on 2 July 2013 he had phoned the business' telephone landline, being the number reflected in the telephone book for Wolfe Electrical and the call was answered by Patrick Wolfe being Althea's husband. Gericke said that during 2010, when he had had dealings with the business Wolfe Electrical, he had dealt with Patrick Wolfe

[11]. He also said that the business continued to be conducted at the same premises as before namely, 15 Thom Street in Paarl. He attached certain documents in corroboration of his allegations.

[12] Together with his reply Gericke served an application to join Mathew as the third respondent in the proceedings in the court a quo. This was opposed but the joinder was eventually granted. Mathew then filed an answering affidavit in which he traversed not only the allegations in the founding papers but also the new matter contained in the replying affidavit.

[13] I should mention that Althea brought an application to strike out the new matter in the replying affidavit. Although the magistrate's ruling on this application does not appear from the record, both counsel accepted that the application had been heard and the that magistrate had refused to strike out the matter in question.

[14] The first point which arises in this matter is whether the close corporation in liquidation has been properly cited and joined. Although Gericke was permitted to amend his notice of motion so as to describe the close corporation as being in liquidation, it does not appear that any attempt was made to serve the application on the liquidator, if there was one, alternatively on the Master. Mr Claasens told us this morning from the bar that, as far as his instructions go, the final liquidation order was referred to the Master but that nothing has happened since then and that no liquidator has been

appointed.

[15] If this is correct, it is obviously very unsatisfactory in respect of a liquidation order granted in April 2013. In view of the conclusion we have reached on the merits, it is unnecessary to decide whether in these circumstances the application should have been served on the Master as the temporary custodian of the affairs of the liquidated close corporation pending the appointment of a liquidator.

[16] A second question which it is convenient to address at this stage is the nature of the power which s 65 confers on the trial court to make an order disregarding the corporate personality of a close corporation. The section says that if the applicant for relief establishes a gross abuse of the corporation's juristic personality, the Court "may" make a declaration. Mr Fergus submitted that this indicated that the trial court had a true discretion and that on appeal a court would only interfere if the discretionary power was exercised on a wrong principle or capriciously or arbitrarily.

[17] The word "may" does not always point to a discretion in the narrow or true sense. The matter was recently discussed in *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Ltd & Another* 2015 (5) SA 245

(CC) in paras 83-89 with reference *inter alia* to the leading decision on this point *Media Workers Association of South Africa & Others v Press Corporation of South Africa Ltd* 1992 (4) SA 791 (A). The word "may" in this setting can indicate a discretion in the broader sense, namely that the court is entitled to have regard to a number of disparate and incommensurable features in coming to a decision. In other words, the court must make a value judgment. This is not a discretion in the true narrow sense in which the repository of the power can follow any one of a number of available courses and still act correctly.

[18] I am inclined to think that the power conferred by s 65 is a broad value judgment rather than a narrow discretion and in that sense may have a similar meaning to the word when it appears in s 424 of the old Companies Act and in various provisions relating to voidable dispositions in the Insolvency Act. If that is correct, we would be entitled to consider the merits of the matter and would not be limited to intervening on the narrow grounds that the magistrate acted on a wrong principle or arbitrarily or capriciously.

[19] However even if we were dealing with a discretion in the true and narrow sense, I think for reasons I am going to briefly indicate that we would be entitled to intervene.

[20] In regard to the new matter in reply, I think that since the magistrate rejected the striking-out application and since Mathew had an opportunity to respond fully to the replying affidavit, which he in fact did, and since Althea could have taken the same opportunity, we would not be justified in upholding Mr Claasens' submission that we should confine our attention to the founding affidavit.

[21] Reference was made by Mr Claasens to the *Plascon-Evans* rule which obviously applies in motion proceedings in lower courts as it does in the High Court. Mr Fergus submitted that there were not in fact any material disputes of fact. In particular the circumstances which Gericke had set out in his replying affidavit were not disputed save for one point, namely the business premises from which Mathew now operates are, according to the appellants, located at 15 Thom Street, not (as the Gericke said) 26 Thom Street (where the close corporation's business premises had been located).

[22] I think it is correct that, save for that, the other particulars about identical telephone numbers and the like are not factually in dispute. But the *Plascon-Evans* rule required the magistrate to accept what the appellants said about the fact that the close corporation ceased business in March 2011,

that Mathew had no involvement in the business of the close corporation, that he is the now proprietor of the business conducted under the name Wolfe Electrical, and that Althea has no interest in the business which Mathew conducts. Those facts were asserted by the appellants and cannot be rejected as manifestly false on the papers.

[23] Because Gericke chose to proceed by way of motion, he deprived himself of the benefits of a trial action. In particular he could not call for discovery and did not have the opportunity to cross-examine Althea or Mathew and any other relevant witnesses. The result was that certain facts which are understandably not within his personal knowledge could not be ascertained and therefore the material on which he was asking the court a quo to operate was inevitably somewhat limited.

[24] When one turns to the merits and considers whether a gross abuse of juristic personality has been proved, the immediate question arises: What is so wrong with the close corporation having ceased its business and with another person, whether associated with the close corporation or not, starting up the same business under the same name? As far as I am aware, a person who is the sole shareholder of a company would be entitled, because of the straitened financial circumstances of the company, to cease its business and to

start a new business of the same kind.

[25] Of course if assets were transferred to the new business other than at fair value, and if the company or corporation in those circumstances were unable to meet creditors' claims, there might be some impropriety. The standard remedy would be to liquidate the company and for the liquidator to impeach any voidable dispositions which took place. But in principle a person who has conducted business through a company or close corporation which is facing large claims is not obliged to continue conducting the business and to earn further income just so that the creditors can be paid. That might be honourable but it is not on my understanding what the law requires.

[26] As to whether assets were transferred other than at fair value, the evidence simply is not before us. One knows that two Ford Bantam bakkies, which were about five or six years old as at 2012, were during that year registered in Mathew's name, having previously been registered in the name of the close corporation. However Gericke has not alleged that Mathew did not acquire the bakkies at fair value. The appellants themselves have said nothing about the matter. I am not sure that we are entitled simply to infer that they were given to Mathew without value.

[27] It is true that on the appellants' version Mathew has been using the same business name but I do not think that that in itself indicates any impropriety in the use of the close corporation. If it has ceased business, I cannot see why a family member should not be permitted to start business under the same name if there is no objection from the close corporation or the persons who control the close corporation. Perhaps there was some goodwill attaching to the name but the evidence simply does not allow us to form any view as to what goodwill, if any, this business had and what the value of it was.

[28] Gericke might have ascertained more information if he had displayed a keener interest in the liquidation. If he had examined the liquidation papers, of which we know nothing, there may have been evidence about the assets and liabilities of the close corporation. In that way Gericke might have ascertained more information but, as matters stand, we do not know that there was any taking over of assets at low or improper values.

[29] Apart from the fact that on the *Plascon-Evans* principle we must accept what the appellants have said about the cessation of the one business and the commencement of the

new business, there are indications that Mathew has taken the proper steps to conduct business in his own name. One can see from certain invoices forming part of the papers that the bank account of the business which Mathew now conducts is a different bank account to the one which the close corporation conducted. One can also see that he has his own VAT number. The sequence of invoice numbers, from the few samples contained in the papers, indicates that he started a new sequence of invoices with his business. The sample invoice from the close corporation is an invoice with a significantly higher sequence number.

[30] I would be willing to accept in assessing this matter that the claim which the close corporation was facing from Gericke was among the reasons why Althea decided to cease conducting the close corporation's business. Whether that claim was the sole motivating factor we cannot say but, as I have indicated, the fact that she felt it was not worth the while to carry on business in the face of claims from creditors does not mean that the cessation of the corporation's business was an abuse by her of the close corporation's personality.

[31] Mathew's decision to start conducting business under the name Wolfe Electrical was not an act which he performed on behalf of or taking advantage of the close corporation's juristic

personality. On the contrary he has from the outset, on the appellants' version, conducted business personally and will of course be personally liable for any of the business' claims since the time he started it.

[32] Even if, contrary to my view, one were to think that there was an abuse of juristic personality, the question would still arise whether it was proper to make the s 65 declaration. Even if this were a true discretion power rather than a broader value judgment, the magistrate should at least have asked himself whether the granting of the order would achieve justice which after all is why in appropriate circumstances the court can disregard the juristic personality of a company or close corporation.

[33] The effect of the magistrate's order is that the personal assets of Althea and Mathew would be available in satisfaction of Gericke's claim, despite the fact that those assets have never had anything to do with the business of Wolfe Electrical and would not have been available if Wolfe Electrical as a business conducted by the close corporation had simply continued or if the business had been placed in liquidation and no substitute business started.

[34] I put to Mr Fergus the example that Althea might have

owned a house for the last 20 or 30 years that would never have been available to Gericke before. Why should it be available to him now? Yet that is the effect of a blunt order declaring Althea and Mathew personally liable on the judgment debt. The magistrate did not as far as we can see ask himself that question and did not consider whether Gericke was any worse off than if the business had simply closed its doors without any new business being started. The close corporation might still have been hopelessly insolvent even if it had continued owning the Bantam bakkies and whatever other assets and book debts were still owing to it.

[35] I cannot see that a declaration was just in the present circumstances. This does not mean that we would condone any impropriety that might have occurred between the close corporation and Mathew in the transfer of assets but these are matters on which there is simply not evidence enabling us to pass any comment. It may be worth Gericke's while to investigate it further.

[36] **IN THE CIRCUMSTANCES I HAVE COME TO THE CONCLUSION THAT THE APPEAL SHOULD BE UPHELD WITH COSTS AND THAT THE COURT A QUO'S ORDER SHOULD BE SET ASIDE AND REPLACED WITH ONE DISMISSING THE APPLICATION WITH COSTS. IN REGARD**

TO THE SCALE OF COSTS, I DO NOT THINK THERE IS A BASIS FOR THE SPECIAL COSTS ORDER THAT MR CLAASENS SOUGHT.

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ROGERS J

I agree.

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KOSE AJ