

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-MOT-GEN-2022/00035

In the matter between:

AFRI-J TRADING CC

APPLICANT

and

DESIRE TRADING INVESTMENT CC

1ST RESPONDENT

RAUNA MUFUKA

2ND RESPONDENT

Neutral citation: *Afri-J Trading CC v Desire Trading Investment CC* (HC-MD-CIV-MOT-GEN-2022/00035) [2023] NAHCMD 132 (17 March 2023).

Coram: CHRISTIAAN AJ

Heard: 9 December 2022

Delivered: 17 March 2023

Flynote: *Contract — Compromise —* What constitutes — Purpose of agreement to put end to existing litigation or avoid pending litigation which might arise because of uncertainty between parties — Compromise may follow upon disputed contractual claim — May also follow upon any form of disputed right — Effect of such agreement was that it barred the bringing of proceedings on original cause of action.

Civil Procedure – Piercing the corporate veil - Section 65 of the Close Corporation Act- what constitutes a gross abuse of the juristic personality of the corporation as a separate entity – close corporations separate existence remains a figment of law, liable to be curtailed or withdrawn when the objects of their creation are neglected or obstructed-court held that the purpose of the first respondent was neglected-second respondent held personally liable.

Summary: Social Services to assist the applicant to order cartridges from the first respondent's supplier's account. The second respondent was informed that the applicant's business had apparently won a tender with the government for the supply of ink cartridges. The second respondent provided quotations to the applicant to indicate a choice of supplier and they have selected a supplier based in South Africa, AW Litho and Digital Printers (Pty) Ltd. The quoted price of N\$ 313 295.52 was accepted with an additional payment of N\$26 000-00 as commission to the first respondent for the services provided to the applicant. An amount of N\$ 340 293-00 as made to the bank account of the first respondent as provided by the second respondent. The amount of N\$ 313 295. 52 was paid to the South African based supplier who failed to deliver the ink cartridges as agreed, claiming non-availability of stock. It was than agreed that the order be cancelled and a refund be processed. The delay in the processing of the refund was caused by the fact that the second respondent failed to locate the supplier. Second respondent resorted to opening a criminal case against the South African based supplier AW Litho, and further through its legal practitioners demanded to AW Litho the payment of the monies advanced. AW Litho agreed to make payment in the amount of N\$ 150 000.00. Despite several attempts by the second respondent, including appointment of debt collectors in South Africa no payment has come forth to date.

Held that the settlement agreement entered into by the parties stipulate that the parties record the terms of this settlement to be in full and final settlement of all present, past and future claims that the parties may have against each other. Which means both parties at the time were well aware of the implications of concluding and signing such an agreement of which they sought the agreement to be made an order of court.

Held further that it is plain, from the exposition of the law that the settlement entered into by the parties brought the original dispute or cause of action to an end. The plaintiff is

accordingly not entitled, in the circumstances, to approach the court on the very cause of action that was settled and eternally put to bed by the parties.

Held that as a sole member of the corporation, the second respondent did not exercise her powers to manage or represent the corporation in the interest of and benefit of the corporation. She also exceeded her powers by allowing a third person to use the corporation and its bank account without the necessary safeguards before transferring the money to the company in South Africa. Close corporations only acquire a separate identity under the Act. Their separate existence remains a figment of law, liable to be curtailed or withdrawn when the objects of their creation are neglected or obstructed.

The court thus held the second respondent personally liable for the amount of N\$ 340 293.00.

ORDER

1. The relief sought under paragraph 1 and 2 of the notice of motion is not granted.
2. The relief sought under paragraph 3 to 6 of the notice of motion is granted with costs.
3. The matter is removed from the roll and regarded as finalised.

JUDGMENT

CHRISTIAAN AJ:

Introduction

[1] The dispute between the parties in this matter arose from a settlement agreement concluded between the parties and which was made and order of court. The purpose of this application is to seek an order that the first respondent breached the party's

settlement agreement signed on the 28th of November 2020 and that because of the breach the applicant terminates the agreement and demands that the first respondent pays the entire amount due to the applicant.

[2] The applicant further seeks an order in terms of section 64 and 65 of the Close Corporations Act¹, for an order that the first respondent be deemed not to be a juristic person and that the second respondent be held liable for the debts of the first respondent personally.

[3] The clauses of the agreement relevant to the present proceedings read as follows:

1. The first respondent agrees to pay to the applicant the amount of N\$40,293.00 no later than 31 December 2020.

2. The first respondent agrees to settle the remainder amount of N\$300,000.00 as follows:

3.1 Payment of N\$ 100,000.00 by no later than 31 December 2021,

3.2 Payment of N\$ 100,000.00 by no later than 31 December 2022,

3.3 Payment of N\$ 100,000.00 by no later than 31 December 2023.

6. Any indulgence granted by the plaintiff to the 1st defendant shall in no way be considered a waiver of any of the plaintiff's rights. Should the 1st defendant default on any payment as stipulated in this agreement the entire remaining balance and interest at a rate of 20% per year, shall immediately become due and payable.

7. If the 1st defendant defaults on any payment stipulated herein, the plaintiff after 30 days' notice to the 1st defendant address as stated in the particulars of litigants or its legal practitioners of record, shall be entitled to recover the full outstanding amount."

9. This agreement constitutes the full and final settlement of all claims which either party may have against one another arising from the oral contract between the parties.

10. This agreement shall be made an order of court and the matter be regarded as finalised.¹²

¹ Close Corporations Act 28 of 1988

² Settlement agreement dated 28 November 2020

Background

[4] I am confident that this ruling will be better appreciated when the background is revealed to the reader, which I dutifully proceed to do.

[5] The second respondent was approached by an employee at the Ministry of Health and Social Services to assist the applicant to order cartridges from the first respondent's supplier's account. The second respondent was informed that the applicant's business had apparently won a tender with the government for the supply of ink cartridges.

[6] The second respondent provided quotations to the applicant to indicate a choice of supplier and they have selected a supplier based in South Africa, AW Litho and Digital Printers (Pty) Ltd. The quoted price of N\$ 313 295.52 was accepted with an additional payment of N\$26 000-00 as commission to the first respondent for the services provided to the applicant. An amount of N\$ 340 293-00 was made to the bank account of the first respondent as provided by the second respondent. The amount of N\$ N\$ 313 295. 52 was paid to the South African based supplier who failed to deliver the ink cartridges as agreed, claiming non-availability of stock.

[7] It was then agreed that the order be cancelled and a refund be processed. The delay in the processing of the refund was caused by the fact that the second respondent failed to locate the supplier. The second respondent resorted to opening a criminal case against the South African based supplier AW Litho, and further through its legal practitioners demanded to AW Litho the payment of the monies advanced. AW Litho agreed to make payment in the amount of N\$ 150 000.00 Despite several attempts made by the second respondent, including appointment of debt collectors in South Africa no payment has come forth to date.

[8] It is on the above basis that the applicant instituted proceedings in the High Court and the parties concluded the proceedings by entering into a settlement agreement. The first respondent failed to comply with the settlement agreement in that it failed to make payment as agreed in terms of the parties' settlement agreement and therefore the applicant seeks an order for the cancellation of the settlement agreement.

Relief sought

[9] The applicant seeks the following relief in his notice of motion:

‘1. The first respondent breached the parties’ settlement agreement dated 28 October 2020 attached to the founding affidavit as JK1 and the amount owed therein has now become due and payable.

2. The applicant hereby terminates the parties’ settlement agreement, and the first respondent is indebted to the applicant in the amount of N\$ 340 293.00.

3. The first respondent in terms of section 65 of the close Corporation Act 28 of 1988 is declared to be deemed not a juristic person in respect of the debt owed by it to the applicant in the amount of N\$340 293.00 in terms of section 64 of the Close Corporation Act 28 of 1988.

4. The second respondent is personally liable for the debts of the first respondent to the applicant in the amount of N\$ 340 293.00 in terms of section 64 of the Close Corporation Act 28 of 1988.

5. Interest in the amount of N\$340 293.00 at a rate of 20% per annum from the date of judgment. Further and alternative relief.

6. Costs of suits.’

Applicant’s case

[10] It is the applicant’s case that the second respondent was the sole member of the first respondent and acted for and represented the first respondent prior to entering into the settlement agreement and afterwards.

[11] The applicant contends that it entered into a settlement agreement with the first respondent in which the first respondent would pay an amount of N\$340,293.00 to the applicant in four annual instalments. The parties settlement agreement was made an order of court. The first respondent breached the settlement agreement in that it failed to make payment and despite demand failed to make payment to date.

[12] The applicant claims that in terms of the settlement agreement, it was entitled to claim the full amount of N\$340.293.00 which became due and payable. In an attempt to

recover the full amount, the applicant issued a writ of execution that was met with a *nula bona* return.

[13] The applicant complains that all efforts to have the first respondent comply with the terms of the agreement has been fruitless and the second respondent has been unresponsive to the applicants calls and text messages, and thus the applicant has no access to the second respondent. The applicant therefore is resorting to the termination of the parties' settlement agreement as a result of the breach of agreement and demands payment of the full settlement amount.

[14] It is further the applicant's contention that section 65 of the Close Corporations Act 26 of 1988 find application in this matter and submits that the second respondent was aware or ought to have been aware of the first respondents juristic personality nature as a separate entity, that debts do not accrue to her personally and thereby represented or acted in an unreasonable manner knowing that the first respondent would not be able to pay its debts.

[15] The applicant further alleges that the second respondent grossly abused the first respondent's juristic personality by representing or acting in an unreasonable manner knowing the first respondent would not have assets to satisfy its debts, by concluding a settlement agreement on behalf of the first respondent knowing its separate personality would protect her actions.

[16] The applicant contends that at all material times arrangements and communications has been between the deponent and the second respondent and applicant was of the view that the second respondent would ensure that payment would be made. The applicant is therefore of the view that deploying section 65 of the Close corporations Act would entitle the applicant an order in terms of which the first respondent would be deemed not to be a juristic person in respect of the debt owed by it to the applicant and that the second respondent would be held personally liable.

[17] The second respondent knowingly carried on of the business of the first respondent with the intent to defraud the applicant and was aware of the first respondents inability to make payment in the amount of N\$340,293.00, and this constitutes recklessness on her part to conduct the affairs of the First respondent.

[18] Lastly, the applicant submits that given the circumstances the second respondent recklessly, negligently or fraudulently carried on the business of the first respondent as provided for in the provisions of section 64 of the Close Corporations Act and is the applicant is entitled to an order for the relief sought in the notice of motion.

Respondent's case

[19] It is the respondent's case that the applicant and the first respondent, duly represented by the second respondent entered in to a settlement agreement and that the first respondent failed to pay the debt due in terms thereof. The applicant issued a writ of execution against the first respondent as a means of debt recovery, but *nulla bona* returns were received. This according to the respondent does not do away with the fact that the first respondent is indebted to the applicant.

[20] As far as it relates to the non- payment of the debt despite attempts by the applicant and the cancellation of the settlement agreement, the respondent argues that settlement agreement was bona fide and that the non-payment was due to the negative impact of the Covid-19 pandemic on the business operations of the first respondent. It is further argued that the first respondent did not generate and income and is therefore unable to pay the debt.

[21] In response to the applicant's allegation that the second respondent grossly abused the First Respondents juristic personality by representing or acting in an unreasonable manner knowing the first respondent would not have assets to satisfy its debts, the respondent denies that the second respondent acted fraudulently, that she was grossly negligent or reckless in the running of the affairs of the first respondent.

[22] The respondent further contends that the second respondent on behalf of the First respondent took active and decisive steps to try and recover the funds from AW Litho in order to reimburse the applicant. There is absolutely nothing to hold the second respondent personally liable for the debts of the first respondent.

[23] The respondent further argues that the applicant can pursue the recovery of the debt from the first respondent by invoking the procedure set out in section 65 of the

Magistrates' Court Act and by way of invoking insolvency procedures.

[24] Lastly the respondent contends that the applicant's attempt to the second respondent personally liable for the debts of the first respondent before even attempting to exhaust available legal remedies is unreasonable and not in the interests of justice.

Issues for decision

[25] The following issues before this honourable court remain for determination as set out in the joint case management report:

- 1.1 That the 1st respondent has not filed an answering affidavit and the applicant is entitled to apply for a default judgment in terms of prayer 1 and 2 of the notice of motion.
- 1.2 That the 1st respondent was used in a manner as contemplated in terms of section 65 of the Close Corporations Act 28 of 1988.
- 1.3 That the 1st respondent should be deemed not a juristic person in respect of the debt owed by it to the applicant in the amount of N\$ 340 293.00 and that the 2nd respondent be held personally liable for the amount owed to the applicant by the 1st respondent.
- 1.4 That the 2nd respondent should be held personally liable for the debts of the 1st respondent as contemplated in terms of section 64 of the Close Corporation Act 28 of 1988.'

Applicable legal principles

Breach of settlement agreement and cancellation

[26] What is not in dispute in this matter is that the parties on 28 October 2020 concluded a written settlement agreement, which was made an order of Court.

[27] There are a few cases in our courts that considered what constitute a settlement agreement and the legal principles governing settlement agreements³. In the case of *Government of the Republic of Namibia and Others v Katjizeu and Other*⁴ the Supreme Court set out the law relating to settlement agreements in the following terms:

[15] ... In *Cachalia v Herbere & Co.*, 1905 T.S. 457 at p.462, SOLOMON, J., accepted the definition of *transactio* given by Grotius, Introduction, 3.4.2., as

“An agreement between litigants for the settlement of a matter in dispute”

Voet, 2.15.1., gives a somewhat wider definition which includes settlement of matters in dispute between parties who are not litigants and later, 2.15.10., he includes within the scope of *transactio*, agreements on doubtful matters arising from the uncertainty of pending conditions “even though no suit is then in being or apprehended”. (*Gane’s trans.*, vol 1, p. 452.). The purpose of a *transactio* is not only to put an end to existing litigation but also to prevent or avoid litigation.

This is very clearly stated by Domat, *Civil Law*, vol.1, para 1078, in a passage quoted in *Estate Erasmus v Church*, 1927 T.P.D. 20 at p 24, but which bears repetition:

“A transaction is an agreement between two or more persons, who, for preventing or ending a law suit, adjust their differences by mutual consent, in the matter which they agree on; and which every one of them prefers to the hopes of gaining, joined with the danger of losing.”

A *transactio* whether extra-judicial or embodied in an order of Court, has the effect of *res judicata*.’

[16] In *PL v YL* 2013 (6) SA 28 (ECG) at 48D-H the court held that:

“The suggestion that besides legislative support the encouragement of a negotiated settlement also requires judicial support is in my view not something which is inconsistent with the policies underlying our law. The settlement of matters in dispute in litigation without recourse to adjudication is generally favoured by our law and our courts. The substantive law gives encouragement to parties to settle their disputes by allowing them to enter into a contract of compromise. A compromise is

³ *Mbambus v Motor Vehicle Accident Fund* 2011 (1) NR 238 (HC), *Metals Australia Ltd and Another v Amakutuwa and Others* 2011 (1) NR 262 (SC), *Government of the Republic of Namibia and Others v Katjizeu and Other* 2015 (1) NR 45 (SC)

⁴ *Government of the Republic of Namibia and Others v Katjizeu and Other* 2015 (1) NR 45 (SC).

placed on an equal footing with a judgement. It puts an end to a lawsuit and renders the dispute between the parties *res judicata*. It encourages the parties to resolve their disputes rather than to litigate. As Huber puts it:

“A compromise once lawfully struck is very powerfully supported by the law, since nothing is more salutary than the settlement of lawsuits.” ’

This was confirmed by the appeal court in *Schierhout v Minister of Justice* [1925 AD 417 at 423] it said:

"The law ... rather favours a compromise . . . or other agreement of this kind; for interest *reipublicae ut sit finis litium*.

'As a natural progression of the notion that the resolution of disputes by agreement, as opposed to litigation, is favoured and is in accordance with the policy of our law, any action by the court which has the effect of expressing a willingness to encourage the settlement of disputes must equally be favoured.'

Karson v Minister of Public Works 1996 (1) SA 887 (E) at 893F – H adds the following:

'It is well settled that the agreement of compromise, also known as *transactio*, is an agreement between the parties to an obligation, the terms of which are in dispute, or between the parties to a lawsuit, the issue of which is uncertain, settling the matter in dispute, each party receding from his previous position and conceding something, either by diminishing his claim or by increasing his liability ... It is thus the very essence of a compromise that the parties thereto, by mutual assent, agree to the settlement of previously disputed or uncertain obligations ...

[17] A Canadian court has considered the effect of a settlement agreement and the following was stated in *George v 1008810 Ontario Ltd* 2004 CanLII 33763 (ON LRB) in para 23:

'At common-law, the effect of a settlement was to put an end to the underlying cause of action: Halsbury's Laws of England, 4th ed., vol. 37, para 391:

Effect of settlement or compromise. Where the parties settle or compromise pending proceedings, whether before, at or during the trial, the settlement or compromise constitutes a new and independent agreement between them made

for good consideration. Its effects are (1) to put an end to the proceedings, for they are thereby spent and exhausted, (2) to preclude the parties from taking any further steps in the action except where they are provided for liberty to apply to enforce the agreed terms, and (3) to supersede the original cause of action altogether. A judgment or order made by consent is binding unless and until it has been set aside in proceedings instituted for that purpose and it acts, moreover, *as an estoppel by record.*' (Underlined and italicised for emphasis).

[28] Further to the above, Van Niekerk J⁵ in the case of *Mbambus v Motor Vehicle Accident Fund*⁶, said:

'The purpose of compromise is to end doubt and to avoid the inconvenience and risk inherent in resorting to the methods of resolving disputes. Its effect is the same as *res judicata* on a judgment given by consent. It extinguishes *ipso jure* any cause of action that previously may have existed between the parties, unless the right to rely thereon was reserved. ... But a compromise induced by fraud, misrepresentation, or some other ground for rescission, is voidable at the instance of the aggrieved party, even if made an order of court.' (Underlined and italicised for emphasis).

[29] The above exposition of the legal principles in the preceding paragraphs gives clear distinction to what a settlement agreement constitutes and its effect. A settlement agreement is therefore in the instance where parties sued each other with regard to disputed obligations, an agreement whereby the parties end the law suit, and by mutual consent adjust their difference putting an end to the underlying cause of action. The effect of the settlement agreement is first, to, amongst other matters, preclude the parties from taking any further steps in the action except where they provided for liberty to apply to enforce the agreed terms, and secondly to extinguish *ipso jure* any cause of action that previously may have existed between the parties, unless the right to rely thereon was reserved.

[30] The question that must be answered in this matter is whether the applicant's claim has any relation to the dispute that previously existed between the parties and which dispute the parties compromised. I will discuss the aforementioned, after I have dealt with

⁵ Quoting from the judgement of *Georgias v Standard Chartered Finance Zimbabwe Limited* 2000 (1) SA 126 (ZSC), p 138I-140D.

⁶ *Mbambus v Motor Vehicle Accident Fund* 2013 (2) NR 458 (HC).

the legal principles applicable to the abuse of the separate juristic personality of a Close Corporation.

Abuse of juristic personality

*Section 65 of the Close Corporations Act*⁷

[31] One of the most fundamental consequences of incorporation is that a close corporation just like a company is a juristic entity separate from its members. Incorporation also entails 'limited liability' of members, with the result that they are generally not liable for the debts of the corporation. Furthermore, the assets of a corporation are the exclusive property of the corporation itself and not of its members.⁸

[32] In the *locus classicus* case of *Salomon v Salomon & Company*⁹, Lord MacNaghten said the following with regard to some of the motives for incorporation, which this court cites with approval:

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

[33] I will cite the relevant provision of the Close Corporation Act 26 of 1988, namely sections 65. Section 65 reads as follows:

'Section 65 -Powers of Court in case of abuse of separate juristic personality of corporation 65. 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 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'.

⁷ Close Corporation Act 26 of 1988

⁸ C f Blackman et al *Commentary on the Companies Act Vol 1* (2002, with loose-leaf updates, Revision Service 1) at 4-114–116.

⁹ *Salomon v Salomon & Company* [1897] AC 22.

[34] The requirement of fraud or other improper conduct finds resonance in the provisions of s 65 of the Act, where the Legislature, with regard to close corporations, has created a statutory remedy ‘which is equivalent to (the court’s) jurisdiction at common law to “pierce the corporate veil” in relation to a company’. Liability under this section depends on a finding of ‘gross abuse of the juristic personality of the corporation as a separate entity’. However, no attempt has been made in the section to indicate the facts or circumstances that would qualify as a gross abuse of the juristic personality of the corporation as a separate entity. The courts are required, in other words, to give content to the open-ended concept of ‘gross abuse’, based on the facts of each particular case. This exercise does not take place in a vacuum, however, and it is axiomatic that the principles and categories developed with regard to piercing the corporate veil in the context of company law will serve as useful guidelines in this context¹⁰.

[35] 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).’¹¹

[36] Angula DJP cleared up the issue with section 64¹² and this court will not duel on it. Veil piercing is an ‘exceptional procedure, a court has no general discretion simply to

¹⁰ *Airport Cold Storage Cold Storage (Pty) Limited v Ebrahim and Others* (3181/06) [2007] ZAWCHC 25; 2008 (2) SA 303 (C) ; (22 May 2007)

¹¹ *Airports case supra*.

¹² *Amupolo v Keumbo Letu Investment CC t/a Keumbo Logistics* (HC-NLD-CIV-ACT-CON-2020/00085) [2021] NAHCNLD 28 (15 March 2021), para 10-11, page 4.

disregard the existence of a separate corporate identity whenever it considers it just or convenient to do so. However, the circumstances in which a court will disregard the distinction between a corporate entity and those who control it are 'far from settled':

'Much will depend on a close analysis of the facts of each case, considerations of policy and judicial judgment. Nonetheless what, I think, is clear is that as a matter of principle in a case such as the present there must at least be some misuse or abuse of the distinction between the corporate entity and those who control it which results in an unfair advantage being afforded to the latter.'¹³

Discussion

[37] Whether the settlement agreement is indeed an agreement of compromise is a matter of contractual interpretation. In this matter the applicant claims damages from the defendant which she alleges she suffered as a result of the defendant having breached the settlement agreement. It is plain from the clauses of the agreement that the settlement agreement was entered into because the parties wanted to put an end to existing litigation and to avoid litigation that might arise because of a state of uncertainty between the parties.

[38] The core provisions of the settlement agreement are:

- (a) clause 1 and 2 which clearly states that the 1st defendant agrees to pay the plaintiff the amount in four instalments, first to be an amount of N\$40 293.00 and three instalments of N\$100 000-00;
- (b) clause 6 provides that any indulgence granted by the plaintiff to the 1st defendant shall in no way be considered a waiver of any of the plaintiff's rights. If the defendant default on any payment as stipulated in the agreement the entire remaining balance and interest at a rate of 20% per shall become due and payable;

¹³ *Airport Cold Storage (Pty) Limited v Ebrahim and Others* (3181/06) [2007] ZAWCHC 25; 2008 (2) SA 303 (C); (22 May 2007).

- (c) clause 9 which provides that the agreement constitutes the full and final settlement of all claims which either party may have against one another arising from the oral contract between the parties’; and
- (d) clause 10 which provides that this agreement shall be made an order of Court and the matter be regarded as finalised. ‘Underlined for emphasis

[39] It is clear from the clause 9 of the settlement agreement that the parties foresaw the possibility of litigation between them arising out of the oral contract and that they expressly abandoned all claims they may have against each other. It is furthermore clear from the agreement as a whole that the purpose of the settlement agreement was to put an end to the possibility of litigation between the parties by redefining their respective rights and obligations and as such, properly construed, the settlement agreement is a compromise.

[40] As I indicated earlier Mrs Kahengombe who appeared for the applicant argued that the respondents allegedly breached the settlement agreement and the breach is the non-payment of the amounts stated in the settlement agreement made by the second respondent on behalf of the first respondent, to the applicant leading to the conclusion of the settlement agreement. I therefore furthermore have no doubt in my mind that the cause of action on which the applicant relies is related to the dispute that previously existed between the parties and which dispute the parties compromised.

[41] I have earlier referred to the Supreme Court matter of *Government of the Republic of Namibia and Others v Katjizeu and Other*¹⁴ where the Supreme Court emphasized that Courts favour and encourage the settlement of disputes by agreement. There is therefore nothing that is contrary to public policy when parties in the pursuit of settling their disputes they agree to terms that may appear to limit their right to claim against each other in respect of terms so settled.

[42] In conclusion the legal principle that the settlement agreement entered into between the applicant and the respondents brought the original dispute or cause of action to an end thus finds application. I am therefore of the view that that the settlement

¹⁴ *Supra* footnote 3.

agreement is a valid agreement of compromise, intended to avoid litigation between the applicant and the respondents on the cause of action that was compromised. There is thus no contractual basis upon which the applicant can approach the court on the very cause of action that was settled and eternally put to bed by the parties.

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

[44] This is an application in terms of which applicant seeks an order that the second respondent be held personally liable for all or any debts and other liabilities of First respondent, a close corporation incorporated in terms of the laws of the Republic of Namibia, owing to the applicant.

[45] The applicant's claim is based on section 64 and section 65 of the Close Corporations Act, 1988 which reads as follows:

‘64. Liability for reckless or fraudulent carrying-on of business or corporation.

“(1) If it at any time appears that any business of a corporation was or is being carried on recklessly, 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 of any such manner, shall be personally liable for all or any of such debts or other liabilities of the corporation as the Court may direct, and the Court may give such further orders as it considers proper for the purpose of giving effect to the declaration and enforcing that liability.

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

Whenever a Court on application by an interested person, or in any proceedings in which a corporation is involved, finds that the incorporation of, or any 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.’

[46] In the case of *Bruni v Ndishishi*¹⁵ the court considered a similar provision like section 64 of the Close Corporations Act, relating to Companies, being section 430(1) of the Companies Act. This is what my sister Prinsloo J, concluded in her interpretation of section 430 of the Companies Act:

"S 430 (1) for our purposes is specifically important as it imposes a statutory liability upon directors and others, without limitation, in relation to fraudulent or reckless trading. Reckless trading is understood to mean carrying on any business in a manner which lacks a genuine concern; a failure to consider the consequences of one's actions and a disregard for consequences.¹⁶ In terms of s 430(1) a director may not be 'party to' reckless trading. In the *Philotex* case, the court held that 'being party to' does not involve the taking of positive steps in the carrying on of the business, it may be enough to support or concur in the conduct of the business....¹⁷

[47] And further

"A director may incur personal liabilities 'for all or any of the debts or other liabilities' of the company as a result of the role that he or she played in governing the company. The court may declare a director liable without proof of the causal connection between the fraudulent conduct and the debts and liabilities for which he may be declared liable..."

[48] It is trite law that veil piercing is an 'exceptional procedure, a court has no general discretion simply to disregard the existence of a separate corporate identity whenever it considers it just or convenient to do so. However, the circumstances in which a court will disregard the distinction between a corporate entity and those who control it are 'far from settled': It is therefore important that the facts of each case be analysed based on

¹⁵ *Bruni v Ndishishi* (HC-MD-CIV-ACT-OTH-2020/03428) [2022] NAHCMD 97 (7 March 2022)

¹⁶ See: *Cronje NO v Stone* 1985 (3) SA 597 (T); *Engelbrecht NO and Others v Zuma and Others* [2015] 3 All SA 590 (GP) paras 19 and 43; *Anderson and Others v Dickson Another NNO* 1985 (1) at 110; *S v Dhlamini* 1988 (2) SA 302 (A) at 308. *Philotex (Pty) Ltd* para 143, and see also *Howard v Herrigel* 1991 (2) SA 660 (A) para 674H; and *Havenga*, (1998) 61 THRHR 719 at 720.

¹⁷ At 142. Also note that the position in *L & P Plant Hire BK en Andere v Bosch en Andere* 2002 (2) SA 662 (SCA) the court held that there had to be a causal link between the reckless conduct and close corporation's inability to pay. Harms JA in *Saincic and Others v Industro-Clean (Pty) Ltd & Another* 2009 (1) SA 538 (SCA) referred to the dicta in *L & P Plant Hire* and held that a causal link is required with respect to creditors' claims. However, it has been submitted that the imputation of liability need not turn on this, and that it should not be construed to be a general requirement.

consideration of policy and judicial judgment. It is therefore important to look at the facts of the current matter.

[49] In the case of *Teichmann Plant Hire (Pty) Ltd v Coetzee*¹⁸, it was held that the wrongdoing alleged on the part of the debtor must not just be a parochial conclusion of the party making the assertion but there must be clear and concise allegations on oath that will be buttressed by evidence of some sort or the other, to enable the court to make the appropriate determination on the application.

[50] The question to be answered is whether the first respondent under the current circumstances was used in a manner as contemplated in terms of section 64 and 65 of the Close Corporations Act 28 of 1988, and therefore be deemed not to be a juristic person in respect of the debt owed by it to the applicant in the amount of N\$ 340 293.00 and that the second respondent be held personally liable for the amount owed to the applicant by the first respondent.

[51] The undisputed background facts derived from the founding papers of the applicant is that the applicant duly represented by the deponent of the founding affidavit entered into an oral agreement whereof the first respondent represented by the second respondent would provide ink cartridges to the applicant. The first respondent failed to procure the cartridges as agreed and the applicant instituted proceedings in the High Court, which was concluded at mediation with a settlement agreement, which was made an order of court.

[52] The second respondent and the applicant selected a supplier based in South Africa, AW Littho and Digital Printers (Pty) Ltd with the quoted price of N\$313 295.52. The applicant paid the amount of N\$340 293 to the first respondents bank account and the amount t of N\$313 295.52 was paid to AW Litho and Digital Printers, on the instructions of the applicant. The South African based supplier failed to supply and deliver the ink cartridges as agreed. The second respondent acting on behalf of the first respondent followed up on the delivery and was informed that the stock is not available and suggested a cancellation of the order and a refund.

¹⁸ *Teichmann Plant Hire (Pty) Ltd v Coetzee* (HC-MD-CIV-ACT 2016-03173) [2017] NAHCMD 61 (8 March 2017)

[53] The second respondent failed to locate AW Litho and Digital Printers in South Africa and opened a criminal case of fraud and theft with the Namibian police. The second respondent through their legal representatives send a letter of demand to AW Litho, and despite these attempts and the appointment of debt collectors in South Africa, no payment has come forth.

[54] The applicant claims that the second respondent being the sole member of the first respondent should be held accountable for the debts of the corporation. The applicant claims in the founding affidavit that the second respondent conducted the affairs of the first respondent in a reckless manner and or for the purpose of defrauding the applicant, and signed a settlement agreement for the payment of debts by the first respondent, whilst knowing that the first respondent did not have sufficient funds to satisfy the settlement agreement amount. The applicant therefore concludes that the action of the second respondent fall within the prohibition of section 64 of the Close Corporations Act, 1988.

[55] From the evidence, the applicant deposited the requested amount into the first respondent's bank account to facilitate the supply of ink cartridges on behalf of the applicant. In the absence of such supply of ink cartridges against payment of the outstanding amount first respondent is in line with ordinary contractual law liable to repay the full amount paid to the applicant.

[56] The first respondent a close corporation is clearly not in the financial position to repay the aforesaid amount hence the applicant's reliance on section 65 of the Close Corporations Act 26 of 1988 to enforce her claim against the second respondent as its sole member.

[57] From the evidence the second respondent created the first respondent as she intended going into a specific business venture. She subsequently also opened a bank account for the close corporation on which she has the sole signatory powers.

[58] I wish to quote the remark by Smuts J, in the matter of *Amupolo v Keumbo Letu Investment CC*¹⁹ in which he said the following:

¹⁹ *Amupolo v Keumbo Letu Investment CC* (HC-NLD-CIV-ACT-CON-2020/00085) [2021] NAHCNLD 99 (29 October 2021)

‘Despite the essential and legitimate roles that corporate vehicles play in the economic system, these entities may, under certain conditions, be misused. It is a legitimate public purpose to ensure that those in control of corporations, mainly commercial ones, are called to account in specified circumstances. A close corporation's establishment as a vehicle for conducting business based on limited liability draws on a legal framework endorsed by society. Any person engaging in these activities should expect that the benefits inherent in this creature of a statute will also have accompanying responsibilities. The members who carry on their activities through the medium of an artificial legal entity must accept the burdens and privileges that go with their choice.’

[59] In *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia and Others*,²⁰ the factual position was described as follows:

‘Behind the ‘corporate veil’ of juristic persons are their members; behind the legal fiction of a separate legal entity are, ultimately, real people. They are the final beneficiaries of the corporate structures which they have created.’

[60] In this matter, the close corporation’s business generally appears to have been conducted with unthinking disregard of statutory requirements and without the necessary safeguards. The second respondent also totally disregarded her fiduciary duty to the corporation. The second respondent allowed the applicant to use the first respondent and its back account be used without the necessary safeguards, should the transaction not go according to plan. The second respondent further proceeds and concludes a settlement agreement on behalf of the first respondent with the applicant, at a time when the first respondent had no assets or money in the bank, with no reasonable prospect of being able to pay any debt it might accrue.

[61] As a sole member of the corporation, she did not exercise her powers to manage or represent the corporation in the interest of and benefit of the corporation. She also exceeded her powers by allowing a third person to make use of its bank account without the necessary safeguards before procuring the ink cartridges for the applicant outside the boundaries of Namibia. Close corporations only acquire a separate identity under the Act.

²⁰ *Africa Personnel Services (Pty) Ltd v Government of Republic of Namibia and Others* (SA 51 of 2008) [2009] NASC 17 (14 December 2009)

Their separate existence remains a figment of law, liable to be curtailed or withdrawn when the objects of their creation are neglected or obstructed.

[62] If the corporate structure is misused, the continued viability of the corporation is unfair. In such circumstances, the courts will exercise their equitable powers to disregard the corporate entity, to "pierce the corporate veil," and thereby hold the proper parties liable for the corporation's actions. When it suited the second respondent, she chose to ignore the separate juristic identity of the corporation by disregarding the standard and applicable legal procedures for doing business. Instead, she allowed a third person to use the first respondents and its bank account as it pleased her.

Conclusion

[63] The use of the corporation allowed for by the second respondent, constituted a gross abuse of the juristic personality of the corporation as a separate entity. This abandonment of her duty to the corporation and its bank account allowed the third person to use the first defendant and its bank account to facilitate the transaction without putting in place the necessary safeguards for the repayment of the amounts deposited if required. As a result, second respondent cannot now choose to take refuge behind the corporation's corporate veil to evade liability for its debts.

[64] I further hold that the corporation is therefore not deemed to be a separate juristic person in respect of the obligations or liabilities of the corporation, and thus the sole member being second respondent, is liable to applicant for the repayment of the money deposited in the amount of N\$ 340 293.00.

Costs

[65] The general rule is that costs follow the event and that costs are in the discretion of the court. The court sees no reasons why the general rule must not apply in this matter.

[66] For the reasons set out in this judgment I make the following Order.

1. The relief sought under paragraph 1 and 2 of the notice of motion is not granted.

2. The relief sought under paragraph 3 to 6 of the notice of motion is granted with costs.
3. The matter is removed from the roll and regarded as finalised.

CHRISTIAAN
ACTING JUDGE

APPEARANCES

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