



**REPORTABLE**

CASE NO: SA 64/2020

**IN THE SUPREME COURT OF NAMIBIA**

In the matter between:

**SWAKOP URANIUM (PTY) LTD**

**Appellant**

and

**IAN ROBERT McLAREN**

**First Respondent**

**ETIENNE GERHARD LUBBE**

**Second Respondent**

**Coram:** DAMASEB DCJ, MAINGA JA and FRANK AJA

**Heard:** 21 October 2022

**Delivered:** 21 November 2022

**Summary:** The appellant (Swakop Uranium) approached the High Court seeking a declarator that the second respondent (Mr Lubbe), as sole member is personally liable for the debts of a close corporation, represented *nomino officio* by the first respondent as its liquidator - in terms of s 64(1) of the Close Corporations

Act 26 of 1988 (the Act); on the ground that Mr Lubbe was party to the business of the corporation being carried on recklessly, with gross negligence or with intent to defraud any person or for any fraudulent purpose. Section 64(1) of the Act provides that in such circumstances, '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.'

Mr Lubbe had raised a special plea to Swakop Uranium's particulars of claim, relying on *Teichmann Plant Hire (Pty) Ltd v Coetzee (infra)*, that to invoke s 64(1) of the Act, Swakop Uranium should have but failed to institute proceedings by way of notice of motion in terms of Rule 65 of the Rules of the High Court and not by action.

The court *a quo* upheld the special plea. The appeal lies against that order.

*Held that*, the word '*application*' is not a term of art but an ordinary word of the English language to which the High Court Rules assigned a specific meaning – and which, had it not been so defined, would not exclude action proceedings. In the absence of a definition of the word *application* in the Act and because the legislature had not by reference to another statute or known practices of the courts, assigned the word a technical meaning, the default position is that the word must be given its ordinary grammatical meaning of a 'formal request to court'. If the word is given its ordinary grammatical signification, it can include either avenue available for instituting court proceedings.

*Held that*, because the legislature had not excluded recourse to action proceedings either expressly or by necessary implication, action proceedings should not be excluded as an alternative avenue for instituting court proceedings in terms of s 64(1) of the Act.

Appeal upheld.

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## APPEAL JUDGMENT

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DAMASEB DCJ (MAINGA JA and FRANK AJA concurring):

[1] If a creditor wishes to lift the corporate veil so as to hold a close corporation's member(s) personally liable for the corporation's debts<sup>1</sup>, should he or she do so only on notice of motion or can he or she also proceed by way of action proceedings?

[2] That is the narrow legal question raised on this appeal. The High Court held, following *Teichmann Plant Hire (Pty) Ltd v Coetzee*<sup>2</sup> (*Teichmann*), that such a creditor must proceed by way of notice of motion to the exclusion of action proceedings.

[3] The appellant (Swakop Uranium) in its particulars of claim sought to hold the second respondent (Mr Lubbe) personally liable for the debts of a close corporation in liquidation, previously known as Lubbe Motor Group CC (LMG CC) – but whose name has since changed to Rensburg Motor Sales CC (RMS CC). Mr Lubbe is the sole member of LMG CC which is represented in the proceedings *nomino officio* by the first respondent - its liquidator.

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<sup>1</sup> In terms of s 64(1) of the Close Corporations Act 26 of 1988.

<sup>2</sup> *Teichmann Plant Hire (Pty) Ltd v Coetzee* (HC-MD-CIV-ACT 2016-03173) [2017] NAHCMD 61(8 March 2017).

[4] Mr Lubbe raised a special plea against the appellant's particulars of claim, that he never signed surety for the debts incurred by the close corporation in liquidation, maintaining that unless the corporate veil is pierced, he cannot be held personally liable for its debts.

#### Factual background

[5] During December 2016, Swakop Uranium purchased a forklift from LMG CC for the amount of N\$763 770, 26. It is alleged that LMG CC was at all times duly represented by Mr Lubbe. Swakop Uranium paid the purchase price, and the forklift was delivered.

[6] Upon taking delivery, Swakop Uranium realised that the forklift was not suitable for the intended purpose, and on 13 October 2017 entered into another agreement with LMG CC - again represented by Mr Lubbe. In terms of the latter agreement, Swakop Uranium would purchase another forklift for the amount of N\$1 245 763, 93 and the previous forklift would be returned to LMG CC and the payment made for it would be used as part of the payment for the new forklift.

[7] LMG CC never delivered the new forklift to the appellant and Swakop Uranium therefore alleges that the close corporation is indebted to it in the amount of N\$763 770, 26 being the difference between the purchase price for the new forklift and the amount paid for the defective one.

[8] In order to recover the aforementioned amount, Swakop Uranium instituted an action in the High Court *inter alia* seeking a declarator that Mr Lubbe acted recklessly and/or fraudulently in respect of the debt allegedly incurred by the close corporation in liquidation and that for that Mr Lubbe should be held personally liable in terms of s 64(1) of the Close Corporations Act 26 of 1988 (the Act).

[9] Mr Lubbe pleaded that in terms of s 64(1) of the Act the proceedings ought to have been instituted by way of notice of motion and not by way of action. Mr Lubbe relied for that proposition on *Teichmann* which held that to invoke s 64(1) of the Act, a claimant is to bring proceedings on notice of motion in terms of Rule 65 of the Rules of the High Court (Rules).

[10] The court *a quo* upheld the special plea with costs. The appeal lies against that judgment and order.

[11] Section 64(1) of the Act states:

‘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.’ (My underlining).

[12] In *Teichmann* the High Court held:

[22] I should pertinently point out that I am of the considered view that the word ‘application’ employed in the Act should not be regarded as idle or inconsequential. It bears a special meaning. It is unfortunately not defined in the Act and in this event, we need to find the meaning of an application elsewhere.

[23] I am of the considered view that the rules of court do give guidance as to what an application is. They, in my view, should be called in aid for the reason that any such application in terms of the s.64, is to be referred to this court for determination. I say so for the reason that the definition section of the Act states that ‘Court – means the High Court of Namibia in terms of Section 7 of the Close Corporations Act 26 of 1988.’ It stands to reason therefore, that this court’s interpretation of an application as contained in this court’s rules should be followed.

[24] According to the definition provisions of the rules of court, application ‘means an application on notice of motion as contemplated in Part 8.’ Rule 65 (1), found in Part 8, on the other hand, provides the following:

“Every application must be brought on notice of motion supported by affidavit on which the applicant relies for relief and every application initiating new proceedings, not forming part of an existing cause or matter, commences with the issue of the notice of motion signed by the registrar, date stamped with the official stamp and uniquely numbered for identification.”

[25] It follows, from the foregoing, that a party seeking to invoke the provisions of s.64, namely, to seek a declarator that a natural person should be held personally liable for the debts or liabilities of a Close Corporation, he or she should make out a case on application, i.e. on a notice of motion setting out the relief claimed and accompanied by an affidavit or affidavits on which the bases for the invocation of the said section is clearly and succinctly spelt out.’

[13] When the matter was argued *a quo*, the learned judge was invited by Swakop Uranium’s counsel not to follow *Teichmann* but to follow the approach

adopted by a South African Court in *Food & Nutritional Products (Pty) Ltd v Neumann*<sup>3</sup> (*Neumann*).

[14] In interpreting a similar provision in that country's Companies Act 61 of 1973<sup>4</sup>, (SA Companies Act) the court held in *Neumann* that bringing proceedings on 'application' did not exclude action proceedings. The court held:

'The conclusion to which I come is therefore that the word "application" in s 424 (1) was not intended to have the narrow meaning of proceedings by way of motion only, but that it was intended to embrace proceedings by way of action as well.'

[15] In the present case, the learned judge *a quo* reasoned that although the ratio in *Neumann* 'is not necessarily incorrect', she was bound by *stare decisis* to follow *Teichmann*. She wrote:

'I cannot find that the *Teichmann Plant Hire (Pty) Ltd* matter was arrived at by some fundamental departure from principle, or a manifest oversight or misunderstanding and is therefore bound to follow it.'

[16] According to the court *a quo*, relying on *Teichmann*, the creditor had to bring an application on notice of motion for a declarator before proceeding with the matter. In other words, a two-phased process: First, an application for a declarator

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<sup>3</sup> *Food & Nutritional Products (Pty) Ltd v Neumann* 1986 (3) SA 464 (W) at 475.

<sup>4</sup> '(1) When it appears, whether it be in a winding-up, judicial management or otherwise, that any business of the company was or is being carried on recklessly or with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the Court may, on the application of the Master, the liquidator, the judicial manager, any creditor or member or contributory of the company, declare that any person who was knowingly a party to the carrying on of the business in the manner aforesaid, shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court may direct.'

from the court that the member concerned knowingly traded in one or more of the manners set out in s 64 and, only then, an action to claim the debt.

[17] According to the High Court in *Teichmann*:

‘[29] Where a creditor moves for a summary judgment application for payment of the amount which is the one that was sought to be claimed against the close corporation, but before a favourable declaration in terms of s 64 is made by the court. . .the said creditor is guilty of putting the cart before the horse. There must first be an application for the lifting of the corporate veil . . . and this application should clearly and succinctly spell out the reasons why it is claimed that the said person or persons carried on the business of the said corporation in the manner set out in s 64 of the Act and that would justify the court . . . imputing the debts or liabilities of the corporation on the members.’

[18] Based on the above reasoning which it found binding on it, the court *a quo* upheld the special plea. The appeal lies against that judgment and order. The appellant sought and was granted leave by the court below and hence the present appeal.

#### The appeal

[19] Swakop Uranium appeals against the court *a quo*'s interpretation of s 64(1) of the Act. As Ms Garbers-Kirsten for Swakop Uranium points out in the written heads of argument, the issue to be determined on this appeal is whether the relief contemplated by s 64(1) of the Act should only be sought by way of motion proceedings or whether it may also be sought by way of action.

[20] The appeal has since become unopposed.

[21] Ms Garbers-Kirsten argued that *Teichmann* was wrongly decided and that, in any event, it is inconsistent with a decision of the High Court preceding it and another subsequent to it, but before the decision which is the subject of the present appeal. (In the circumstances, the High Court in the present matter was at large to consider which interpretation was the more acceptable one).

[22] *Hangula v Motor Vehicle Accident Fund*<sup>5</sup>, was decided before *Teichmann*.

In that case, the High Court held:

[13] The other objection raised by the exception is that the present proceedings should have been brought by way of motion because (i) no disputes are anticipated and (ii) it is in the nature of a mandamus. It is added for good measure that motion proceedings are faster and less costly compared to action proceedings. I am not aware of any rule of law, and none has been pointed out to me, that supports the view that a proceeding must be dismissed because it was brought by way of action when motion proceedings would have been more convenient and cost effective. In my view, it is a sort of consideration that is more appropriately had regard to when the court reaches the stage of apportioning costs. As was observed by Murray JP in *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1162:

“(W)here no real dispute of fact exists, there is no reason for the incurrance of the delay and expense involved in a trial action and motion proceedings are generally recognised as permissible.”

It is trite that even where a statute makes provision for proceedings to be initiated by way of motion it does not exclude proceedings to be brought by way of action.<sup>6</sup> A fortiori, where a statute does not expressly provide for motion proceedings.

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<sup>5</sup> *Hangula v Motor Vehicle Accident Fund* 2013 (2) NR 358 (HC).

<sup>6</sup> See *Food & Nutritional Products (Pty) Ltd v Neumann* 1986 (3) SA 464 (W); *Adfin (Pty) Ltd v Durable Engineering Works (Pty) Ltd* 1991 (2) SA 366 (C); *Howard v Herrigel and Another NNO* 1991 (2) SA 660 (A).

there can be no bar in principle to proceeding by way of action'.(Own Emphasis Added)

[23] The other decision which points in the opposite direction of *Teichmann* but subsequent to it, is *Eighty Four CC T/A Shisa Nyama Wernhil*<sup>7</sup>. In that case, the court was faced with a similar situation as the present. The defendant raised a special plea to the effect that the plaintiff ought first to have brought an application to lift the corporate veil by way of motion proceedings before proceeding to sue by way of action.

[24] The court held that s 64(1) of the Act should not be given a restrictive interpretation and that where a dispute of fact is foreseen, the right procedure to follow is action proceedings. Given the averments of reckless and negligent running of the affairs of the corporation, disputes of fact will most certainly arise, therefore it was correct to proceed by way of action to invoke s 64(1).

[25] In the South African case of *Adfin (Pty) Ltd v Durable Engineering Works (Pty) Ltd*<sup>8</sup>, which was cited with approval in *Hangula*, the court was approached on summons to set aside a decision of the Master of the High Court, rejecting an objection to a liquidator's account. Section 407(4)(a) of the SA Companies Act provides that a person aggrieved by a correction of the Master may apply to court for an order setting aside the Master's decision.

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<sup>7</sup> *CJ Smith & CO v CJ Investments Number Eighty Four CC T/A Shisa Nyama Wernhil* (HC-MD-CIV-ACT-OTH-2019/04027) [2021] NAHCMD 154 (27 October 2021).

<sup>8</sup> *Adfin (Pty) Ltd v Durable Engineering Works (Pty) Ltd* 1991 (2) SA 366 (C).

[26] The applicant in the matter sought an order setting aside the respondent's combined summons as an irregular proceeding on the ground that relief should have been sought on notice of motion and not by way of action. The court dismissed the objection on the ground that neither Rule 53 of the Uniform Rules of Court nor s 407(4) (a) of the South African Companies Act render proceedings by way of notice of motion preemptory.

[27] Another case referred to in *Hangula* is *Howard v Herrigel and Another NNO*<sup>9</sup>, which concerned the question whether the respondents were entitled to seek relief in terms of s 424(1) of the South African Companies Act by application proceedings and not by way of action. The court accepted the dictum in *Neumann* that a wide interpretation should be accorded to the form of proceedings to be used when an order is sought to declare a person personally liable for the debts by lifting the corporate veil. The court reasoned that the correct approach is that a litigant is entitled to seek relief by way of action if it has reason to believe that disputes of fact might arise.

### Disposal

[28] The question is, by referring to 'upon application to court', did the legislature have in mind the specific meaning that the word bears in the rules made in terms of s 39 of the High Court Act 16 of 1990? Does it follow, as the High Court assumed in *Teichmann*, that because the word application is not defined in the Act, it must have the meaning assigned to it in the rules?

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<sup>9</sup> *Howard v Herrigel NO & another* (130/89) [1991] ZASCA 7; 1991 (2) SA 660 (AD); [1991] 2 All SA 113 (A) (8 March 1991).

[29] The difficulty with the *Teichmann* approach is that the Act gives no indication that by using the word *application* the legislature intended to give it a technical legal signification. That is not to disregard the maxim that the legislature is presumed to know the law and that it must be assumed to have been aware that under the Rules *application* means proceedings by way of notice of motion.

[30] To come to that result however we must be satisfied from the language used in the Act that action proceedings were excluded.

[31] The word *application* is not a term of art<sup>10</sup>, but an ordinary word of the English language to which the Rules assign a very specific meaning which, had it not been so defined, would not exclude action proceedings. The Oxford Advanced Learners Dictionary (International Student's Edition) defines the verb 'apply' as 'to make a formal request, usually in writing'. It renders the noun '*application*' as 'a formal (often written) request for something: [for example] his application to court for bail has been refused').

[32] In the absence of a definition of the word *application* in the Act - and because the legislature had not by reference to another statute<sup>11</sup> or known practices of the courts - assigned the word a technical meaning, the default position is that the word must be given its ordinary grammatical meaning of a 'formal request to court'. If the word is given its ordinary grammatical meaning, it includes either avenue available for instituting court proceedings in the High Court.

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<sup>10</sup> A term of art is a word or phrase that has a precise, specialized meaning in a particular field or profession.

<sup>11</sup> The High Court Act 16 of 1990 which is the foundation for the High Court Rules makes no provision that proceedings in the High Court by application shall exclude action proceedings.

[33] That this interpretation should be preferred to the one adopted in *Teichmann* is demonstrated by the inevitable absurdity that will result if the opposite view prevails. In our practice, where in motion proceedings the court is unable to resolve disputes of fact on affidavit, it may direct that oral evidence be led. Resolving disputes of fact by oral evidence is a procedure unique to action proceedings while motion proceedings are intended for the resolution of disputes on common cause of facts.

[34] The view that 'upon application' in s 64(1) of the Act connotes notice of motion to the exclusion of action proceedings would mean that the court may not have recourse to oral evidence on disputed facts under s 64(1) of the Act. That cannot be correct.

[35] I come to the conclusion that because the legislature had not excluded recourse to action proceedings either expressly or by necessary implication, action proceedings should not be excluded as an alternative avenue for instituting court proceedings in terms of s 64(1) of the Act.

#### Order

[36] In the result the appeal succeeds with costs, including costs occasioned by the employment of instructed counsel, and the judgment and order of the High Court are set aside and replaced with the following:

'The special plea is dismissed, with costs'.

[37] The matter is remitted to the High Court (managing judge) for further case management in terms of the Rules of the High Court.

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**DAMASEB DCJ**

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**MAINGA JA**

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**FRANK AJA**

APPEARANCES:

APPELLANT:

H Garbers-Kirsten

Instructed by Koep & Partners

FIRST RESPONDENT:

No appearance

SECOND RESPONDENT:

No appearance