

SOUTH AFRICA / JUDGMENT

**Botha NO and Another v Loggenberg
NO and Another (1892/2010) [2010]
ZAFSHC 153 (2 December 2010)
[2010] ZAFSHC 153**

COURT

Free State High Court, Bloemfontein

BEFORE

Rampai

CASE / FILE NUMBER

1892/2010

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FREE STATE HIGH COURT, BLOEMFONTEIN

REPUBLIC OF SOUTH AFRICA

Case No. : 1892/2010

In the matter between:-

DEON MARIUS BOTHA N.O.First Appellant

CYNTHIA HARDING N.O.Second Appellant

and

CHARLOTTA AUGUSTA LOGGENBERG N.O.First Respondent

ANTON GEORGE VORSTER N.O.Second Respondent

HEARD ON: 11 NOVEMBER 2010

JUDGMENT

BY: RAMPAL, J

DELIVERED ON: 2 DECEMBER 2010

- [1] These are motion proceedings. The matter came by way of an ordinary application. The applicants pray for judgment against the respondents, in their representative capacities as trustees, for the payment of the capital amount of R442 480,00, interest thereon a tempore morae plus the costs of the application. The application is opposed.

- [2] There are certain undisputed facts in this matter. I will, as best as I can, give a synopsis of such common cause. The applicants herein are the joint liquidators of a juristic entity called Klein-Cor Boerdery CC. They were appointed on 19 April 2007 by the Master of the North Gauteng High Court. The respondents are the co-trustees of a non-juristic entity called Anton Loggenberg Family Trust with registration number IT2067/97.
- [3] The historical background appears to be helpful. The trust apparently derives its name from a certain Mr. Anton Loggenberg. He is the spouse to the first respondent, Ms Charlotta Augusta Loggenberg. The first respondent's husband was once a landowner. He owned, among others, a landed property, known as Weltevrede farm in the district of Parys. He became insolvent. His insolvent estate was finally sequestered in the year 1997. In that same year a trust, the Anton Loggenberg Family Trust, was established. The insolvent's wife, in other words, the first respondent and her brother, the second respondent, were appointed on 27 August 2001 – annexure “DMB2” – as the co-trustees of the family trust by the Master of the Free State High Court. Subsequent to the sequestration of the first respondent's husband, the family trust acquired Weltevrede farm in 1997. The Loggenberg couple still reside on the same farm.
- [4] On 3 March 1998 Klein-Cor Boerdery CC (KCB) came into existence. The business was allocated registration number 1998[010997]23. Its founding members were Ms Charlotta Augusta Loggenberg and her husband, Mr. Anton Loggenberg. The latter resigned six and half years later, on 23 November 2004, to be precise – annexure “DMB3”. He was a farmer by occupation. At all times material to the history of the trust, he conducted farming on the land owned by the trust. The vehicle, through which he carried on such farming activities, was KCB. This corporate structure was designed to exploit the natural resources of the trust land by way of agriculture, forestry, hunting and fishing.
- [5] The first respondent remained the sole member of KCB after the resignation of her husband. She continued to use KCB as a corporate structure by means of which farming operations were conducted on the land belonging to Loggenberg Family Trust (LFT). Two years or so after the first respondent's husband had resigned as a member of KCB, a corporate enterprise called Technikon Oesbeskerming (Pty) Ltd launched an application in the Pretoria High Court for the winding-up of KCB. The winding-up application was brought under case number 37020/06 TPD as the North Gauteng High Court was then called. It was finally successful.
- [6] On 19 April 2007 the Master North Gauteng High Court, Pretoria appointed the applicants, Ms Cynthia Harding, the second applicant and Mr. Deon Marius Botha, the first applicant, as the joint liquidators of KCB as would more fully appear from annexure “DMB1”.
- [7] The liquidators started investigating the affairs of KCB and ascertained that there was a connection between KCB and LFT. They established that the first respondent was the sole member of the close corporation and the sole beneficiary of the respondent trust. As they were perusing the documents they obtained, during the course of their investigation into the

affairs of the insolvent CC, they discovered certain management statements pertaining to KCB. Of particular interest to them was a balance sheet dated 31 July 2005 – annexure “DMB4”. In addition to such a document they also discovered a financial statement dated 31 August 2005 – annexure “DMB5”. Both documents concerned KCB.

- [8] The applicants then investigated the matter further. They caused an inquiry to be held in terms of section 152 Insolvency Act No. 24 of 1936. Three witnesses were examined at the inquiry held at Vanderbijlpark from 3 March 2008, namely Ms C.A. Loggenberg, the first respondent, her husband, Mr. Anton Loggenberg and Mr. Manual José de Gouveia, the accountant who attended to the bookkeeping of both the LFT and KCB. On the strength of annexure “DMB4”, annexure “DMB5” together with the testimonies of the three witnesses the liquidators of the close corporation came to the conclusion that LFT was indebted to the insolvent close corporation KCB. Through this application the liquidators seek judgment against LFT in order to recover the amount, which, as they allege, is due to KCB by LFT on a loan account. This then completes the summary of undisputed facts and facts, which although not common cause, are not seriously disputed.
- [9] The following allegations are in dispute: The respondents deny that the applicants jointly decided to launch this application. They asserted that Ms Cynthia Harding was not a party to these proceedings and that she was wrongly cited as the second applicant by the first applicant. Accordingly it was submitted that the first applicant had no locus standi in iudicio to litigate alone without the backing of his joint liquidator. This point was raised in limine. I dismissed the preliminary objection but gave no reasons for my ruling.
- [10] The respondent trust relied on the provisions of section 56(4) Insolvency Act, 24 of 1936, which provides that trustees must act jointly in performing their functions as such and that each trustee is jointly and severally

liable for every act jointly performed by them.

“Whenever two or three trustees have been appointed, every act in law connected with the estate, must be done by all of them. Thus it is not proper for one trustee to sign for himself and his co-trustee unless especially authorised thereto by a power of attorney from his co-trustee.....”

See Mars: The Law of Insolvency, 8th Edition, p. 246.

GOLDSSELLER v HILL 1908 TS 822 and 827

- [11] In the replying affidavit the first applicant averred (at 26.1) that he and Ms Harding jointly decided to launch this application. He averred that at the time the application was launched, Ms Harding was temporarily out of the country. He stressed that they deliberated and resolved to bring the application before Ms Harding left the country.

The averment has to be read together with the second applicant’s confirmatory affidavit, attested at Melbourne in Australia on 14 April 2010, which was attached to the replying affidavit and marked annexure “REP5”.

- [12] The point taken by the respondent trust has no substance. The second applicant fully participated together with the first in the decision to launch these current proceedings. She signed annexure “REP5” in Australia. Of particular significance is the observation that she did so before the application was launched. This signifies or rather verifies that the two trustees indeed jointly resolved to sue the respondent trust. The mere fact that the second applicant’s confirmatory affidavit was not annexed to the founding affidavit did not render the application fatally defective.
- [13] In this case there are two co-liquidators to whom the affairs of the insolvent close corporation have been entrusted. I am convinced that both were party to all these proceedings ab initio – Mars, supra, 9th Edition,
- p. 340; MILLMAN, NO v GOOSEN 1975 (3) SA 141 (O). The applicants demonstrated by deeds and not just words that they jointly resolved to sue. In my view the KCB governing body of liquidators did not suffer from any functional incapacity. In the absence of any diagnosis of dysfunctional paralysis, the decision in LAND AND AGRICULTURAL DEVELOPMENT BANK OF SA v PARKER AND OTHERS [2004] 4 ALL SA 261 (SCA) does not apply. The identities of the two liquidators and proof of their appointment was adduced in the founding affidavit and proof of their joint participation in suing on behalf of KCB (in liquidation) was adduced in the replying affidavit. This then are the reasons for the ruling I made earlier.
- [14] The respondents also deny that the first respondent is or was a trustee in control of LFT; that serving notice of the application upon the first respondent alone constitutes or would have constituted effective notice thereof to the trust; that before the winding-up, KCB was a creditor of the trust, in other words, that the trust owed no amount of money to KCB; that there were no factual disputes; that at the insolvency inquiry the first respondent admitted the indebtedness of the respondent trust to the close corporation; that the aforesaid monthly management statement and annual financial statements provided indisputable evidence that the trust owed the close corporation the amount claimed; that the evidence given by the accountant of the business enterprises concerned, showed that such a debt ever existed; that the accountant’s evidence also showed that a debt, if ever it existed at all, was never repaid; that the business affairs or farming operations of LFT, KCB and Klein-Cor Brahman Stoetery CC were intertwined.
- [15] The denials of the respondent trust continued. They denied that the management statement dated 31 July 2005 – annexure “DMB4” – correctly recorded the alleged loan account; that the outstanding amount of debts due to KCB by its debtors for the financial year ending on 31 August 2005, as per annexure “DMB5”, was almost the same as the outstanding amount of debts which was due to KCB by its debtors as on 31 July 2005 as per the management statement – annexure “DMB4”; that at the insolvency inquiry the Loggenberg couple admitted the liquidators’ claim that there existed a loan in favour of KCB against LFT, which had not been repaid; that the latest set of financial statements – annexure “DMB4” and “DMB5” - prepared by Mr. De Gouveia, reflected the true and correct picture of the financial affairs of the close corporation; that this accountant confirmed that he was unaware of any

repayment(s) made by LFT to KCB after the drafting of those financial statements; that neither Ms Loggenberg nor Mr. Loggenberg confirmed LFT made no repayment(s) to KCB after the compilation of those financial statements and that the logical conclusion of all these was that KCB had an indisputable claim against LFT, which the applicants as the liquidators were bound to collect.

- [16] The deponent of LFT averred that a debt, if any, which LFT might have owed to KCB by 31 July 2005, had already prescribed as far back as July 2008, long before the current application was launched on 15 April 2010. The respondent trust pleaded that, in actual fact, it had no knowledge of the alleged debt. It averred that its deponent, in other words the first respondent, was not authorised to admit, if at all she did, on behalf of LFT, the alleged debt in favour of KCB. It averred further that its own annual financial statements – annexure “B” – for the year ending 28 February 2006, revealed that it was indebted to its own trustees (the respondents) and not to the close corporation KCB, as the liquidators alleged. The respondent trust also averred that KCB owed its creditor, Afgri Bedryfs Beperk, the sum of R1 270 932,6. Since KCB failed to pay such debt, the respondent trust, as surety and co-principal debtor, was sued and paid on behalf of KCB – annexure “C1” and annexure “C2” (an affidavit). By so doing, so averred the respondent trust, the loans it owed to its trustees were reversed, discharged or negated, to use the first respondent’s exact words.
- [17] The cardinal issue in the case is whether or not the respondent trust owed the amount claimed to the insolvent close corporation. If the answer is in the affirmative, the immediate question which arises, is whether or not such claim has since been extinguished by the effluxion of time. Should the prescription defence fail, then in that event, the next question which falls to be answered, would be whether the debt has since been discharged by repayment.
- [18] Mr. Van der Merwe, counsel for the applicants, submitted that the aforesaid issues must all be determined in favour of the applicants. However, Mr. Zietsman, counsel for the respondents, differed. He submitted that the applicants had failed on their own papers to prove, not only that the respondent trust owed any money to the insolvent close corporation which they as liquidators were entitled to claim, but also the precise amount of the alleged debt.
- [19] In the first place, I deal with the issue of the alleged debt. In the founding affidavit the first respondent stated that he and the second applicant were going through the documents relating to KCB when they stumbled upon the following entry recorded under item 4, p.5, annexure “DMB4”.

“KLEIN-COR BOERDERY BK

AANTEKENING TOT DIE BESTUURSTATE vir die elf maande geëindig 31 JULIE 2005

31/07/05 31/08/04

RAND RAND

(11 MAANDE) (12 MAANDE)

4. DEBITEURE

BTW ontvangbaar 14381 -

Klein-Cor Stoetery BK

(28060) 61980

Anton Loggenberg Familie Trust 442480 413890

C A Loggenberg 605775 493588

Voorskot: King Foods 2000 Ton 450000 - __ __

1484576 969458

=====

Ex facie this progressive record of the financial affairs of KCB, the respondent trust was listed among the debtors of the close corporation.

According to the accountant's entry, LFT owed KCB an amount of R442 480,00. It is not in dispute that this management financial

statement was prepared by Mr. M.J. De Gouveia, an appointed chartered accountant of both KCB and LFT. The entry per se suggests that prima facie a loan account in favour of KCB against LFT existed as on 31 July 2005.

[20] At the time annexure "DMB4" was drafted, the first respondent was the sole member of KCB. Her husband had resigned about eight months earlier. The management statements were later presented to the first respondent. She fully signed the first page of this seven page document and initialled the rest. Above her signature the following declaration appears:

"Die aangehegte bestuurstate, uiteengesit op bladsye 3 tot 7, word hiermee deur die lid op 8 September 2005 goedgekeur as 'n ware en redelike weergawe van die beslote korporasie se stand van sake op 31 Julie 2005, asook van sy bedrywighede vir die elf maande geëindig op daardie datum."

[21] The accountant described p. 1 of the aforesaid document as

"Goedkeuring van die bestuurstate."

By appending her signature to that page and making the declaration, the first respondent approved the statements. Her approval covered the entry which is now the core of this current dispute. The New Shorter Oxford English Dictionary, 1993 Edition: Lesley Brown, Volume 1, p. 103 defines the verb to approve as follows:

“Latin – approbare: make good, assent to as good; 1) Show to be true, demonstrate. 2) Corroborate, attest. 3) Confirm authoritatively; sanction. 4) Pronounce or consider to be good or satisfactory; commend, be in sympathy or agreement.”

- [22] It is a thin argument for the respondent trust to contend that because annexure “DMB4” dated 31 July 2005 represented the management statements for the eleventh month and not the entire financial year of KCB, it was an unofficial document with little or no evidential value. The significance of the annexure cannot be underplayed as the respondent trust would have it. It cannot be simply wished away. It was in reality part and parcel of ten other building blocks progressively recorded at regular intervals. Through such monthly financial records, the financial affairs of the close corporation were regularly captured and preserved. The underlying idea was to ensure that the annual financial statements for the financial year of KCB was a reasonably accurate and true account of the financial affairs of the business enterprise concerned.
- [23] The financial year of KCB ended on 31 August 2005. The official financial position of the close corporation for the particular year was captured and recorded in a written document, annexure “DMB5”. It represented the annual financial statements of KCB for a complete twelve months period. In this annexure, unlike in annexure “DMB4”, the debtors of KCB were not individually specified. The outstanding total due to KCB by the debtors as on 31 August 2005 was R1 162 503,00 down by R322 073,00 from such a total as on 31 July 2005, a month earlier, which was R1 484 576,00. I shall revert to this mathematical difference later. Suffice to say that these two annexures prompted the liquidators to investigate the existence and circumstances of the alleged loan account.
- [24] The applicants, as liquidators, invoked the provisions of section 152 of the Insolvency Act No. 24 of 1936 which provides that:
- “152 Master may direct trustee to deliver documents or property or call upon any person to furnish certain information (2) If at any time after the sequestration of the estate of a debtor and before his rehabilitation, the Master is of the opinion that the insolvent or the trustee of that estate or any other person is able to give any information which the Master considers desirable to obtain, concerning the insolvent, or concerning his estate or the administration of the estate or concerning any claim or demand made against the estate, he may by notice in writing delivered to the insolvent or the trustee or such other person summon him to appear before the Master or before a magistrate or an officer in the public service mentioned in such notice, at the place and on the date and hour stated in such notice, and to furnish the Master or other officer before whom he is summoned to appear with all the information within his knowledge concerning the insolvent or concerning the insolvent's estate or the administration of the estate.*
- [25] Such an inquiry was held at Vanderbijlpark on 21 April 2008. The first respondent testified at the inquiry and she was examined at length in connection with the alleged loan account due to KCB by LFT. On behalf of the applicants it was submitted that the evidence given by the first respondent at the inquiry established that such a loan existed. On behalf of the respondent trust it was submitted that the evidence obtained from one instead of two

respondent trustees was so procedurally irregular and insufficient that it was of no binding legal force and effect on the respondent trust.

- [26] The argument that the applicants improperly ambushed the first respondent by examining her alone in the absence of the second respondent in order to elicit from her alone an admission that the respondent trust owed the insolvent close corporation, has no substance. It was well within the ambit of their statutory right for the liquidators to examine the first respondent or the second respondent or both in an endeavour to ascertain the existence or otherwise of the loan now in dispute. The section authorises the master to call upon any person to furnish certain information.
- [27] They apparently wanted to examine the second respondent as well, but they did not know his exact whereabouts. Certainly the first respondent knew the correct contact details of the second respondent, but for some reasons, best known to herself, she withheld the information. She and the second respondent were biological siblings. It would appear that her brother is an attorney by profession and that she knows he resides at 36 Donkin Street, Beaufort West in the Western Cape Province. He was probably more knowledgeable or clued up about things such as insolvency inquiry and financial statements. On her own accord, the first respondent would not have hesitated to have her legally trained brother on her side at the insolvency inquiry if the respondent trust was properly functioning as a trust should. Presumably the second respondent would greatly have refreshed the first respondent's memory which, as she claimed, was failing her concerning the alleged loan.
- [28] Two documents are of significance here. The first is annexure "B" to the answering affidavit. It purports to be a confirmatory affidavit by Mr. Anton Georg Vorster, the second respondent. The annexure is unsigned by the alleged deponent. For that reason it is not attested by a commissioner. What is even worse, the first respondent proffered no explanation concerning these rather strange features of what was intended to be a confirmatory affidavit by her co-trustee. I have a feeling, and it is a very strong feeling, that the respondents were nothing more than paper trustees and that the first respondent's husband was the driving force behind the scene, as regards the operations of the respondent trust. The first respondent and the second respondent were *de iure* but not *de facto* trustees. It seems to me that the affairs of the respondent trust were virtually left in the hands of an insolvent individual in much the same way as those of the close corporation. This then, perhaps, explains why the second respondent, an attorney and a brother to the first respondent, does not support his sister and fellow trustee to oppose the current application.
- [29] The second document of importance is annexure "B" to the answering affidavit. It purports to be the financial statements of LFT for the year ending 28 February 2006. Nowhere on this important document about the affairs of the respondent trust does the signature of the second respondent appear. The first respondent singularly purported to approve such financial statements on 16 October 2006. This annexure fortifies my submission that, for sometime, the second respondent has not meaningfully and practically participated together with the first respondent, if she ever participated other than by appending her

signature to certain documents, as genuine trustees of the respondent trust. How long the respondent trust has been so incapacitated is anyone's guess. In these circumstances it is certainly not open for the first respondent, who for the past three years at least, has been running the show alone, albeit irregularly through her husband, to complain that she was ambushed by the liquidators when she was confronted alone at the insolvency inquiry.

- [30] The following instances of the exchange between counsel for the liquidators and the first respondent at the insolvency inquiry is of vital importance to the main issue.

"Nou as mevrou na hierdie dokument wil kyk dan sal ek hom vir jou beskikbaar stel, maar jy kan aanvaar ek sal nie 'n wanvoorstelling op die rekord maak nie en ek wil vir jou lees wat daar staan op bladsy 3 van hierdie finansiële state van Klein-Cor. Daar staan: Bedryfsbates wat insluit debiteure en vee voorhande en die debiteure was so R1.4 miljoen met 'n nota nommer 4 van die aantekeninge en as 'n mens nou na die aantekeninge gaan kyk dan sê die aantekeninge vir jou dat die Anton Logenberg Familie Trust so R442 000,00 en uself R605 000,00 vir die BK geskuld het. Nou het mevrou geld by die BK geleen? --- Ja, Kyk ek weet, ek kan nie vir jou daardie antwoord gee nie hoor, ek kan dit nie vir jou gee nie."

"Maar ek meen as u 'n debiteur is dan kan dit net een ding beteken en dit is die BK het vir u geld voorgeskied. --- Kyk, as dit daar staan dan is dit so."

Ja wel, dit staan hier. --- Dan is dit so.

En die BK het lyk vir nie finansiële state van die jaar 2006 nie. ---

Nee, daar is nie state nie.

Hierdie is die laaste state, die 2005 state? --- Sover ek weet, ja. Is dit Augustus?

En die BK weet ons is in Februarie 2007 gelikwieder. --- Dit is reg. 2006.

Nee, dit is 2007 mevrou. --- O ekskuus, dit is nou – ja, dit is reg, dit is reg."

- [31] The very first answer the first respondent gave to the question related to the personal loan of the first respondent to the close corporation. The first respondent was examined at length about her listed personal debt in favour of KCB. She gave very evasive answers. She frequently claimed that her memory did not serve her well any more on account of the long passage of time since 31 July 2005 when her apparent indebtedness to the close corporation was recorded and 21 April 2008 when she was quizzed about particulars of such a debt. On a few occasions the first respondent also claimed that her husband had a better knowledge of such a matter than she did.

- [32] The aforesaid admission of debt by the first respondent was a collateral issue. This application is concerned with the debt of the respondent's trust in favour of the close corporation. However, it does not follow from this fact, that the collateral admission is irrelevant. It will soon become obvious why such collateral issue is significantly relevant. The first respondent was the sole member of the close corporation which lent her the

money. Moreover she was the sole beneficiary of the respondent trust, which had allegedly or apparently received a substantial loan from the same close corporation. Although the respondent trust had two trustees the first respondent alone signed and approved its annual financial statements; alone derived financial benefits from the respondent trust and alone resisted the relief sought by the applicants. From all these objective facts it may be legitimately inferred that the first respondent is the dominant trustee who supremely controls the respondent trust.

- [33] The management statements of KCB suggest that the respondent trust, just like the first respondent, owes a substantial amount of money to the close corporation itself. At the insolvency inquiry she was questioned about it. This is how the crucial exchange between the examiner representing the liquidators and the first respondent went:

“En die Anton Logenberg Familie Trust, waarvan mevrou nou ‘n Trustee is, het die Trust die geld terugbetaal? --- Nee, ons het nog nie daardie geld terugbetaal sover ek weet nie.

So die Trust skuld ook die BK die geld? --- Sover ek weet. As dit daar is, as dit daar staan dan is dit so. Ek kan nie – ek het nie daardie goeters deurgegaan om te weet nie.”

- [34] In the answering affidavit at par. 2.2.8 first respondent makes the following averments:

“Die Agbare Hof sou voorts merk vanuit die ondervragings-notule dat ek in my hoedanigheid as voormalige lid van die Klein-Cor Boerdery BK ondervra is, en dat ek deurgaans nie kennis gedra het van hierdie skuldverpligting van die trust teenoor die BK nie, maar is daar deurgaans aan my syfers voorgehou vanuit die BK se finansiële state waarop ek nie enige kommentaar kon lewer bo en behalwe om te sê dat indien dit daar staan, dit seker so moet wees nie.”

- [35] This is a new version. The version now presented by the respondent trust is at odds with the version previously presented by the trust. The current version presented at the court hearing fundamentally differs from the version presented at the insolvency inquiry. It now appears that the respondent trust wants me to believe that the first respondent did not really have knowledge of the underlying causa from which the debt arose. I find this new version hard to believe. It is farfetched and untenable. It is a recent fabrication. The new version is designed as a disingenuous ploy to create a storm in a tea cup.

- [36] Where the material facts are in dispute, it is generally undesirable to endeavour to decide an application upon affidavits

- PLASCON-EVANS PAINTS LTD v VAN RIEBEECK PAINTS (PTY) LTD [1984] ZASCA 51; 1984 (3) SA 623 (AD) at p. 634 I – 635 C. In the instant case the material facts averred by the applicants (founding affidavit), though denied by the respondent trust (answering

affidavit), were previously admitted by the respondent trust (insolvency inquiry). Such material facts were that LFT owed KCB;

that deponent of LFT also personally owed KCB; that both debts were recorded in the financial statements of KCB; that the trust and the first respondent were also indebted to KCB the year before, 2004; that the 2005 debts were bigger than those of the preceding year; that the first respondent was in control of both the close corporation and the respondent trust. The current denials by the

respondent trust are materially inconsistent with its previous sworn statement. Not every dispute constitutes a genuine dispute. There is no real factual dispute in this instance. The respondent trust is hopelessly attempting to defend the indefensible. In my view, there is no real factual dispute about the existence of the loan. The factual averments by the applicants are inherently credible to justify the final relief sought.

- [37] The first answer provided by the first respondent (vide par. 33, supra) implicitly acknowledged or presupposed that a debt due to the close corporation by the respondent trust did exist. The second answer reinforced the first answer. The first respondent once again made an abortive attempt to neutralise her admission that LFT owed money to KCB.
- [38] It will be readily appreciated that the first respondent easily confirmed the identities of various creditors of the respondent trust, such as OTK Beperk, Landbank and Senwes. As regards the creditors, her memory served her very well. She did not ask that questions be deferred to her husband. The names of two of these creditors were listed in the same annexure “DMB4” where her name and that of the respondent trust were also listed as debtors. It would, therefore, seem that the first respondent did not have genuine impaired recollective faculties. She deliberately suffered from selective amnesia only where the shoe pinched.
- [39] I have to stress that the entry about the loan was recorded by the accountant of KCB. Where else could the accountant have received such details from if not from the sole member of the close corporation, the first respondent herself? The evidence of her husband was not without significance. His evidence as far as this aspect was concerned, cannot simply be ignored. He, like his wife, deferred some questions to the accountant. That defence has certain consequences.
- [40] The accountant was the first witness to testify at the insolvency inquiry. He testified that the latest set of management and financial statements of the close corporation which he had prepared – annexures “DMB4” and “DBM5” – contained a true and correct account of the financial affairs of KCB. No sound reasons were given during the insolvency inquiry and the court hearing why the accountant’s averments should not be accepted. Before the insolvency inquiry the first respondent never questioned the correctness of the indebtedness of the respondent trust to the close corporation.
- [41] It is, indeed, correct that LFT did have financial statements for the year ending 28 February 2006, which covered the period 1 March 2005 to 28 February

2006. The loan in dispute was specifically recorded in the management statements of KCB on 31 July
2005. One would have expected the same loan to have been similarly recorded in the interim management statements of LFT as well as for the fifth month, viz 31 July
2005. The mere fact that, according to the annual financial statements of LFT for the year ending 28 February 2006, some seven months after the KCB entry was recorded, KCB was not shown to be a creditor of LFT, according to its own financial statements, cannot be a valid contention that, therefore, LFT did not owe any money to KCB. The argument is flawed for two reasons: firstly, the deponent of the respondent trust compares two unlikes, viz an annual financial statement – annexure “B” answering affidavit – versus an interim management statement – annexure “DMB4” founding affidavit. Secondly, she compares two further incomparables,

viz 28 February 2006 versus 31 July 2005. This illogical and inconsistent comparison cannot serve as a proof that the respondent does not owe the insolvent close corporation any money. The focus of the case is the presence of an incriminating entry in the records of a particular close corporation and not its absence or non-appearance in the records of another entity. Had the respondent trust annexed its own interim management statement of the corresponding period, namely 31 July 2005, the argument would, perhaps, have carried some evidential weight. On the facts, the applicants have proved, on a balance of probabilities, that the respondent trust owed the close corporation the amount of money claimed.

- [42] The question which now immediately arises, is whether or not such a loan, claim or debt has since been extinguished by effluxion of time.
- [43] It is the alternative case of the respondent trust that, any possible claim that KCB might have had against LFT, has become prescribed. Accordingly, I was urged to dismiss the application on this ground. However, the applicants’ contention was that the claim of KCB, which has vested in them as liquidators since the winding-up, has not become prescribed as the respondent trust alleged.

- [44] Section 12(3) of the Prescription Act, 68 of 1969 provides that:

“12 When prescription begins to run (3) A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.

Section 13(1) of the Prescription Act, 68 1969, provides that:

“13 Completion of prescription delayed in certain circumstances

- (1) If-

- (e) the creditor is a juristic person and the debtor is a member of the governing body of such juristic person; or the period of prescription shall not be completed before a year has lapsed after the day referred to in paragraph (j)."

Section 14(1) of the Prescription Act, 68 of 1969 provides that:

"14 Interruption of prescription by acknowledgement of liability (1) The running of prescription shall be interrupted by an express or tacit acknowledgement of liability by the debtor."

[45] Section 359 of the Companies Act, 61 of 1973 provides that:

"359 Legal proceedings suspended and attachments void (1) When the Court has made an order for the winding-up of a company or a special resolution for the voluntary winding-up of a company has been registered in terms of section 200-

- (a) all civil proceedings by or against the company concerned shall be suspended until the appointment of a liquidator; and..."

[46] Section 66 of the Close Corporations Act, 69 of 1984 provides that:

"66 Application of Companies Act, 1973 (1) The provisions of the Companies Act which relate to the winding-up of a company, including the regulations made thereunder, (except certain specified sections) shall apply mutatis mutandis and in so far as they can be applied to the liquidation of a corporation in respect of any matter not specifically provided for in this Part or in any other provision of this Act."

[47] The onus of establishing that a claimant's claim has been extinguished by prescription rests upon a defendant or respondent party who invokes such a prescriptive defence – GERICKE v SACK 1978 (1) SA 821 (AD).

[48] In a case where the applicant claimant admits that the prescription did begin to run at a specific point in time, but avers that the actual running of the prescription was, at a specific point in time, interrupted by a certain event then, in such circumstances, the onus rests on the applicant claimant who confesses the commencement of prescription, but seeks to avoid the completion of the prescriptive period by invoking a suspensive interruption - ABSA BANK BPK v DE VILLIERS 2001 (1) SA 481 (SCA) on p. 486 – 487.

[49] In the case of statutory claims, as envisaged in sections 26, 29, 30 and 31 Insolvency Act No. 24 of 1936, the liquidation of a juristic person or the sequestration of the natural person automatically suspends the running of such prescription until the appointment of liquidators. However, in the case of the non-statutory claims, in other words ordinary claims by creditors against their debtors, a creditor's liquidation or sequestration, whatever the case may be, does not suspend the normal running of prescription. The instant claim does not fall under any of the aforesaid statutory claims category.

- [50] In MINISTER OF FINANCE AND OTHERS v GORE NO 2007 (1) SA 111 (SCA) it was held that in the case of a non-statutory claim, the knowledge of the insolvent close corporation or that of its member, is deemed to be knowledge of the liquidators thereof and its imputed to him.
- [51] It was contended, on behalf of the respondent trust, that because its name first appeared as one of the debtors in the interim management statements of KCB on 31 July 2005, then the underlying debt owing by the respondent trust or for that matter, all the debts owing by such specified debtors, became due and payable on 31 July 2005 at the very latest. Therefore, so it was submitted, all such debts became prescribed on or before 30 July 2008, almost two years before these proceedings were initiated.
- [52] The deponent of the respondent trust failed to furnish any sound reason or to give any good explanation for this broad assertion. It was clear and obvious upon my reading of the relevant paragraph of her answering affidavit that she was uncertain as to precisely when the respondent trust incurred the debt and when such debt fell due and payable. In the absence of such vital information it cannot be submitted, with serious conviction, when prescription commenced let alone when such debt was extinguished by extinctive prescription.
- [53] Those facts about such a huge debt or claim were supposed to be well within the first respondent's peculiar knowledge. She should have known better than anyone. No-one was better placed than she was, not only as regards the business affairs of the respondent trust which borrowed the money, but also those of the close corporation which lent the money to the respondent trust. Indeed she was the controlling mind and the dominant force behind the affairs of the two entities.
- [54] It is my considered view that the respondent trust has dismally failed to discharge the onus of establishing a valid defence of prescription, not once but twice: firstly, at the insolvency inquiry by way of oral testimony and secondly, at the court hearing by way of sworn statement. I fail to understand what it is that will enable the respondent trust to prove prescription by way of action proceedings which it could not do by way of motion proceedings over and above the insolvency inquiry overseen by a magistrate where its deponent was afforded ample opportunity to orally give an account of all she knew about the debt. If she does not know anything now about the claim, as she stated in her answering affidavit, it makes no sense to expect that at the action hearing in the distant future, she would be in a better recollective mode to articulate the defence of prescription raised by the respondent trust.
- [55] In any event, even if the respondent trust had sufficiently particularises its defence of prescription, it would still have had a mountain to climb. Where a creditor is a juristic person and a debtor is a member of such juristic person's governing body, extinctive prescription does not run against such juristic creditor in favour of such a debtor – section 13(1)(d) Prescription Act 68 of 1968. Where such a special relationship exists, prescription does not commence running from the date on which the causa, which underlies the debt,

arises as it is usually the norm. In such a situation the commencement of prescription is conditionally delayed for as long as such special relationship continues to bind the creditor and the debtor together. However, the conditional delay does not end there. It remains in force and endures for one more year beyond the actual date on which the special relationship terminates.

- [56] In a nutshell, the crux of the section is that prescription starts running against such a juristic creditor only after a year has elapsed since the day upon which the connective bond was severed. The debtor's management and control of such a creditor is a recognised inhibiting impediment. It is obvious that until and unless such a burdensome impediment falls away, such a creditor is virtually powerless to do anything to recover its claim due by its debtor.
- [57] In the instant case, such a special relationship existed between KCB, a juristic creditor, and the respondent trust, the debtor. The vital connective tissue between the two entities was the first respondent. She was the sole member of the juristic creditor and also the sole beneficiary of the respondent trust. She domineeringly controlled the mind, heart and soul of the respondent trust as if she was its sole trustee. She obviously, but wrongly, used LFT as her alter ego. For all intents and practical purposes the loan by "her" close corporation to "her" family trust was for her exclusive benefit. The substantial loan of R603 775,00 (page 5 annexure "DMB4) founding affidavit), which she admittedly never repaid to KCB, evidences the point I am making very well.
- [58] Section 359 Companies Act applies equally well to the winding up of the affairs of the close corporations. It was expressly imported by section 66 of the Close Corporations Act, 69 of 1984. The section provides that prescription does not run against a liquidated close corporation until the appointment of liquidators. In this case, the applicants were appointed as the liquidators of KCB on 19 April 2007. Of course, they did not immediately become aware of the debt. Even after they had become aware of the apparent debt, they still had to embark on some investigation to have it clarified and verified. They, among other things, had to arrange an insolvency inquiry. They only gained constructive knowledge of some material facts about the debt and of the identity of the trust, as a debtor, through the evidence given at the inquiry held at Vanderbijlpark on 21 April 2008.
- [59] The onus to establish prescription rested upon the respondent trust. I am still in the dark as regards some material facts concerning this particular defence of the respondent trust. It was not possible to ascertain the exact date on which the claim was extinguished by prescription, since the version of the respondent trust as to precisely when prescription commenced running, was plagued by vagueness. At all material times the debt was deemed not to be due and payable. On the peculiar facts such debt could only have become due and payable, before the winding up, on demand by the juristic creditor – section 12(3) Prescription Act 68 of 1968. There is no evidence whatsoever that KCB ever demanded the repayment of the debt. The respondent trust has not, in my view, discharged the onus necessary to establish its defence of prescription.

- [60] The deponent for the respondent trust has had ample opportunity, not once but twice, to say what she wanted to say about the prescription of the claim in question. She was at all times material to the case the only witness with the necessary knowledge of the material fact pertaining to the debt. Nobody can speak better than she can for the respondent trust. So far she had spoken with two tongues. Her two versions are totally irreconcilable. What is even worse is that she made both of them on oath.
- [61] However objective consideration may be given to this whole invidious situation of the respondent trust, one thing realistically emerges and that is that the hopelessness of the situation can only get worse if the first respondent were given a third opportunity to speak for the respondent trust. In my view, there is no need for any further evidence to be heard on the issue of prescription. There is nothing which requires further clarification. The legal position is clear. I am not persuaded that action procedure would have led to a different conclusion. Put differently, I am not convinced that the respondent trust was adversely affected or was denied a fair hearing through the use of motion procedure instead of action procedure. Therefore, I would dismiss the defence of prescription.
- [62] I turn now to the third and final issue. The last defence was that during February 2007 the respondent trust paid, in its capacity as surety and co-principal debtor, an amount of R1 270 932,60 to Agri-Operations Limited, a creditor of KCB CC.
- [63] In the answering affidavit the respondents' trust deponent denied that she had any knowledge of the respondents' indebtedness towards the close corporation. The denial was in sharp contrast to her evidence at the insolvency inquiry. Before she went on to admit that the respondent trust indeed owed the close corporation, she answered the question whether the respondent trust had repaid the debt. On page 59, 5 – 7 the question and the answer were captured as follows:
- “En die Anton Logenberg Familie Trust, waarvan mevrou nou ‘n Trustee is, het die Trust die geld terugbetaal? --- Nee, ons het nog nie daardie geld terugbetaal sover ek weet nie.”*
- [64] The evidence of her husband did not confirm or contradict that of the first respondent. Instead of committing himself, one way or the other, he suggested that the matter be taken up with the accountant. Implicit in his response, was his unconditional acceptance that whatever the accountant's answer might be, could be taken as a true and correct answer. He was prepared to abide by the accountant's answer concerning the debt. However, the first respondent's admission that the debt was still unpaid as on 21 April 2008, corroborated the testimony of the accountant of the close corporation and the respondent trust to the effect that annexure “DMB4” and annexure “DMB5” contained true and correct records of the affairs of KCB. Of even more importance was the accountant's evidence that he was not aware of any repayment of such debt by the respondent trust to the close corporation at any stage subsequent to the drafting of such management and financial statements which the first respondent approved on 8 September 2005 and 17 August 2006 respectively. The first respondent's husband implicitly agreed that the debt was never repaid at any time as far as

he knew. This is the consequence of his deference to the accountant. He is bound by it. Because he is bound, the first respondent is, through reference, also thereby bound. She too deferred questions to him. In the circumstances it cannot be said that the respondent trust or any witness was not bound by what the other witness said at the inquiry.

- [65] On the strength of the testimonies of the aforesaid three witnesses - Ms Loggenberg, Mr. Loggenberg and Mr. De Gouveia - there can be no dispute that the respondent trust has not repaid the debt. The respondent trust bears the onus to prove repayment of the debt – PILLAY v KRISHNA, supra. It has failed to discharge the onus.
- [66] The respondent trust merely made a bold allegation that, according to annexure “B”, answering affidavit, the respondent trust was no longer indebted to the close corporation on 28 February 2006. However, no specific date is averred on which such payment was made and by whom. There are three different versions of how the payment was made. The first was that the trust did so; the second was that the trust, with the aid of its trustees, did so; the third was that the attorneys of the respondent trust did so. The court is not supposed to guess. On this new version of the respondent trust, I am expected to speculate that a substantial debt of R442 480,00 was repaid somewhere between 31 July 2005 and 1 March 2006.
- [67] At paragraph 3.2, annexure “B”, the amount of the unsecured loans is reflected as R489 557,00:

“3.2 ONVERSEKERDE LENINGS 489 557

Bogenoemde lenings is onverseker,
rentevry en geen terugbetalingsreëlings
is vasgestel nie.:

- [68] According to the first respondent at paragraph 2.12, answering affidavit, such an amount represents “onversekerde lenings” by the respondent trust to her and her brother as trustees. It has to be borne in mind that the first respondent’s brother is not even a beneficiary of the respondent trust; has apparently nothing to do with the day to day controlling of its business affairs and lives at Beaufort West in the Western Cape Province, far away from Parys here in the Free State Province. Why would he be so kind to grant to the respondent trust such a big loan, which is

“onverseker, rentevry en geen terugbetalingsreëlings is vasgestel nie.”

- [69] The whole thing sounds too good to be true. No averment was made as to how the alleged loans were made up. Suspicion exists on the mind of counsel for the applicant that the loan due to KCB could well be concealed by camouflage in the so-called “onversekerde lenings ... aan ons as trustees”. The defence of any direct payment falls to be rejected.

- [70] At paragraph 2.13, answering affidavit, the respondent trust attempted to explain that during February 2007 it made a payment of R1 270 932,60 to Agri Operations Limited on behalf of KCB, the principal debtor. It averred that by virtue of a suretyship agreement, the respondent trust had signed in favour of Agri Operations Limited, the creditor, it paid the debt which KCB failed to pay. See annexure “C2”, confirmatory affidavit by a certain Mr. P.L. Janse van Rensburg. It was further alleged that the funds were actually provided by the trustees to satisfy the writ – annexure “C1”, answering affidavit, and that payment had been captured as loans to the respondent trust on the loan accounts of the trustees.
- [71] Although the respondent trust did not expressly say so in so many words, I got the feeling that the respondent trust obscurely wanted to invoke set-off as a defence. However, a set-off cannot be invoked against an entity which is already in liquidation. The effective date of the winding-up of KCB was 8 November 2006. In law the date on which an application was issued for the winding-up of the close corporation, is deemed to be the effective date of its winding-up. The winding-up order granted in February 2007 is deemed by the operation of law to apply retrospectively from 8 November 2006. The final liquidation order was granted in February 2007.
- [72] The entries in annexure “C3” made interesting reading. The annexure represents the annual financial statements of the respondent trust for the year ending 28 February 2007, which the first respondent unilaterally approved on 24 October 2007. Such entries presupposed the existence of a debt which Loggenberg Family Trust owed to KCB. It is a matter of simple logic that if there was no earlier debt owing, there could not have been a set-off. By making such entries, the respondent trust acknowledged the existence of the debt due by itself to the close corporation. The annexure revealed the fallacy of the earlier unsubstantiated allegation made by the deponent of the respondent trust that the debt could have been paid as early as 1 August 2005.
- [73] Moreover, the entries in annexure “C3” belied the apparent untruthful allegation of the first respondent as a deponent of the respondent trust that the entries in annexure “B” related to the debts due by the respondent trust to its trustees. If that was indeed true, there could have been no genuine set-off vis-a-vis Loggenberg Family Trust and KCB.
- [74] In the circumstances the issue of repayment of debt, by way of a set-off, must also be decided in favour of the applicant. I would therefore dismiss the defence of payment in any form including the defence of set-off or the defence of straight settlement of debt.
- [75] In the circumstances I am inclined to grant judgment in favour of the applicants.
- [76] The applicants have emerged victorious. There is no reason to deprive them of the fruit of their success. The costs have to follow the course of success.
- [77] Accordingly I make the following order:

Judgment is granted in favour of the applicants against the respondent trust for payment of:

The capital amount of R442 480,00;

The accrued interest thereon at the rate of 15,5% per annum calculated from 21 April 2008, being the date on which the insolvency inquiry was held;

The costs of the action.

M.H. RAMPAL, J

On behalf of applicants: Adv. M.P. van der Merwe Instructed by:

Naudes

BLOEMFONTEIN

Ref.: MO/sjvr/TIM6/0030

On behalf of respondents: Adv. Paul Zietsman S C

Instructed by:

Matsepes Inc

/sp

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