

SOUTH AFRICA / JUDGMENT

HUV Cape Spice v Hotspice Sauce CC (22227/2010) [2011] ZAWCHC 218 (10 May 2011) [2011] ZAWCHC 218

COURT

Western Cape High Court, Cape Town

BEFORE

Louw

CASE / FILE NUMBER

22227/2010

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Republic of South Africa

In the Western Cape High Court of South Africa

Case No: 22227/2010

In the matter between;

HUV CAPE SPICEApplicant

Versus

HOT SPICE SAUCES CCRespondent

Judgment delivered: 10 May 2011 Louw J

- [1] The applicant in this application for the provisional liquidation of the respondent, is a sole proprietorship business carried on by Hans Ulrich Plotz {Plotz} under the name HUV Cape Spice. The liquidation of the respondent is sought on the basis that the respondent is unable to pay its debts within in the meaning of section 68(c), read with section 69(c) of the Close Corporations Act 69 of 1984.
- [2] The background to the application is as follows. In 2004 an entity described in the summons as: 'HUV Cape Spice a private company with limited liability duly incorporated and registered as such, in accordance with the companies law of Germany, with registration number 1804626808 and having its principal place of business at AM-Hafen 3, 25548. Kellinghusen, Germany',

Judgment delivered: 10 May 2011

Louw J

[1] The applicant in this application for the provisional liquidation of the respondent, is a sole proprietorship business carried on by Hans Ulrich Plotz {Plotz} under the name HUV Cape Spice. The liquidation of the respondent is sought on the basis that the respondent is unable to pay its debts within in the meaning of section 68(c), read with section 69(c) of the Close Corporations Act 69 of 1984.

[2] The background to the application is as follows. In 2004 an entity described in the summons as:

'HUV Cape Spice a private company with limited liability duly incorporated and registered as such, in accordance with the companies law of Germany, with registration number 1804626808 and having its principal place of business at AM-Hafen 3, 25548. Kellinghusen, Germany',

sued the respondent in this court under case number 6650/04 for damages arising from breach of contract. In the Particulars of Claim it was alleged that the contract between the parties 'was concluded between the plaintiff, duly represented by Mr. Hans Ulrich Plotz\ On 9 January 2009, the court, per Le Grange J, granted judgment in favour of the plaintiff against the respondent for damages in the total amount of Euro 116 087, 28 together with interest at 15, 5% from 12 August 2004 to date of payment and costs of suit. In his judgment Le Grange J, described Plotz. who testified on behalf of the plaintiff, as 'the owner of the plaintiff company which is based in Germany'.

[3] The respondent's application for leave to appeal against his judgment and order was refused by Le Grange J. The respondent thereupon sought leave to appeal from the Supreme Court of Appeal. In one of the grounds upon which the latter application was based, the respondent raised the point for the first time that the entity described in the summons as HUV Cape Spice 'a private company with limited liability duly incorporated and registered as such, in accordance with the companies law of Germany', did not exist. In an opposing affidavit by Plotz, HUV Cape Spice admitted that it was not a legal person in the form of a company registered in Germany but stated that its proper description is that of 'a firm or business duly registered in Germany in accordance with the (German) Trade Regulation Act'.

[4] The respondent's application for leave to appeal to the SCA was subsequently refused.

[5] Plotz. who deposed to the launching affidavit in this application, explained that he founded a sole proprietary business in Germany in 1994. This business was duly registered as a firm in accordance with the provisions of the German Trade Regulation Act in January 1994. The business first carried on a real estate business in Germany. In 2002, after Plotz had duly filed an amendment to the registration of his business in Germany to reflect that the business also traded 'in goods/commodities'. Plotz started conducting his business predominantly from South Africa where he procured spices and had it shipped to Germany for distribution in that country, under the name HUV Cape Spice. This was a continuation of the business which Plotz started in 1994 and Plotz remained the sole proprietor of that business. The

registered place of the business and its trading name in Germany remained unchanged. The action against the respondent which culminated in the judgment and order of le Grange, J. arose from the business activities Plotz carried on in South Africa. Plotz further explained that the incorrect description of his business as a company was caused by the fact that he had heard South Africans refer to their business as a company, and that he, through ignorance, erroneously instructed his attorneys at the time the action was instituted against the respondent, that his business was a company. This resulted in the plaintiff HUV Cape Spice being described in the summons as a private company registered in Germany. [6] The basis of this application for the provisional liquidation of the respondent is that the applicant is the judgment creditor under case nr 6650/04 against the respondent, that the respondent is not able to pay the judgment debt which at the current rate of exchange of the rand to the Euro amounts to approximately R2m and that the respondent is consequently unable to pay its debts. [7] The respondent raises two defences to the application. The first relates to the applicant's locus standi. It is contended that the applicant lacks locus standi to bring the application on two bases, namely: the applicant is incorrectly cited as HUV Cape Spice and that Plotz should have

brought the application in his personal capacity. The second defence based on the lack of locus standi is that the judgment creditor in terms of the judgment granted against the respondent under case nr 6650/04 is not the applicant but is in fact a non-existent entity. The applicant is consequently not a creditor of the respondent. [8] The second defence raised is that the respondent has not been shown to be unable to pay its debts as contemplated in section 68(c) read with section 69 (c) of the Close Corporation Act.

- [9] The direct factual evidence by Plotz is that the entity, HUV Cape Spice which instituted the action against the respondent and which culminated in the judgment and order by Le Grange J. is in fact no other than Klotz himself carrying the business of which he is the sole proprietor and that it is the same entity as the HUV Cape Spice which has launched the present application for the provisional liquidation of the respondent. This evidence cannot be disputed. The dispute raised by the respondent in regard to the validity of the registration of the business as a sole proprietorship in Germany was conclusively refuted in reply by the applicant and the further supplementary affidavit filed on behalf of the respondent has not cast any doubt on the validity and the cogency of the registration of the business as a sole proprietaryship in Germany. [10] It is contended, however, on behalf of the respondent that the applicant must be cited as Plotz in his personal capacity and not as HUV Cape Spice. There is no merit in this contention. The provisions of Rules 14(1) and (2) of the Rules of Court, read together, provide that a 'business . . . carried on by the sole proprietor thereof under a name other than his own', is a 'firm* which may sue or be sued in its own name. The first point raised in respect of the applicant's focus standi does not succeed. [11] The second point raised in regard to the applicant's locus standi, is that the applicant cannot rely on the judgment and order granted by le Grange J against the respondent. While the respondent cannot and does not seriously dispute the factual allegations made by Plotz, it is contended on behalf of the respondent that such evidence does not assist the applicant because the

plaintiff in the action is ex facie the summons, a company, which is not only a separate legal entity, but also one, which it is common cause, does not exist. It is therefore contended that not only can the applicant not bring the application on the basis of the judgment, but that the judgement is, in any event, in itself a nullity because it was granted in favour of an entity in the form of a company, which does not exist.

[12] In my view the contentions on behalf of the respondent is based on a fallacy. The description of a party to a suit does not immutably determine the nature and identity of a party. The law reports are replete with instances where the incorrect description of a party was allowed, in the absence of prejudice to the other parties involved, to be changed to reflect the true state of affairs See for instance, *Four Tower Investments fPtv) Ltd v Andre's Motors* 2005(3) SA 39 (NPD). In an action in the magistrates' court which went on appeal to the High Court, the plaintiff was cited in the summons as a company Shortly before the hearing of the appeal, it was established that the plaintiff was in fact a close corporation. The plaintiff then asked for an amendment on appeal to change the citation of the plaintiff from that of a company, to a close corporation. The defendant resisted the application for the amendment on the basis that since the plaintiff as cited was a non existent entity, the summons was a nullity and that in any event, the service of the summons, not having been issued and served at the instance of the plaintiff as a close corporation, even if the summons were not a nullity, did not interrupt prescription. On the evidence which showed that it was the close corporation which had acted throughout and that the citation was in fact nothing but a misdescription of the plaintiff, the amendment was allowed. At 47E it was held that [29) ... if the citation of a party is nothing more than a misdescription, it should not matter whether the incorrect citation happens on the face of it to refer to a nonexisting entity or indeed to an existing but uninvolved entity.

[13] In this case the evidence demonstrates that it was the business as a sole proprietorship that acted throughout as the plaintiff in the action and that the description of the plaintiff as a private company with a limited liability duly incorporated and registered as such in Germany, was in fact nothing more than an incorrect description of the entity HUV Cape Spice, a business conducted under that name and owned by Plotz. [14] The issue in this application is whether the applicant is the judgment creditor in terms of the judgment of le Grange. J. The evidence in this application shows that that is indeed the case and that the applicant is in fact the same entity as the plaintiff in the action and is therefore, the judgment creditor. The applicant therefore has the necessary locus standi to bring this application, as the judgment creditor, for the provisional liquidation of the respondent, who is the judgment

debtor.

[15] The next issue is whether the respondent is unable to pay its debts. The judgment debt is for the rand equivalent of E 116 087,28 together with interest at the rate of 15% per annum from 12 August 2004 is due and payable. This is an amount of approximately R2m. The respondent's financial statements for the year ending 28 February 2010 reflect assets of R 67

974.00. On its own version the respondent has at least since 2009 not been trading and has no trading income. It has been financed through loans obtained by and through its sole member Mr Adams who deposed to the answering affidavit on behalf of the respondent. Adams states that the respondent has on bona fide and reasonable grounds resisted paying the judgment debt because for the reasons stated earlier, it considers the judgment not to be in favour of the applicant but to be in favour of a non-existent entity. In any event, further loans, he states, will be obtained and be made available to the respondent to finance further expenditure as it arises. There is however no suggestion that a loan to cover the judgment debt will be forthcoming. In my view it is clear that the applicant has made out, at least a prima facie case that the respondent is not possessed of funds and readily realisable assets to cover the judgment debt and is consequently unable to pay its debts. There is no suggestion on behalf of the respondent that if that is the finding, this court should not provisionally wind up the respondent. The contention that the liquidation of the respondent

will not be to the advantage of creditors such as Mr. Adams does not constitute a valid objection to the winding up of the respondent. It follows that the respondent must be placed under provisional liquidation.

[16] I consequently make an order: It is ordered that:

1. Respondent is placed under a provisional order of liquidation in the hands of the Master of the High Court;
2. A rule nisi is issued calling upon all persons concerned to show cause, if any, to this Court at 10h00 on Wednesday 27 July 2011, or so soon thereafter as counsel may be heard, why:

sued the respondent in this court under case number 6650/04 for damages arising from breach of contract. In the Particulars of Claim it was alleged that the contract between the parties 'was concluded between the plaintiff, duly represented by Mr. Hans Ulrich Plotz\ On 9 January 2009, the court, per Le Grange J, granted judgment in favour of the plaintiff against the respondent for damages in the total amount of Euro 116 087, 28 together with interest at 15, 5% from 12 August 2004 to date of payment and costs of suit. In his judgment Le Grange J, described Plotz, who testified on behalf of the plaintiff, as 'the owner of the plaintiff company which is based in Germany'.

- [3] The respondent's application for leave to appeal against his judgment and order was refused by Le Grange J. The respondent thereupon sought leave to appeal from the Supreme Court of Appeal. In one of the grounds upon which the latter application was based, the respondent raised the point for the first time that the entity described in the summons as HUV Cape Spice 'a private company with limited liability duly incorporated and registered as such, in accordance with the companies law of Germany', did not exist. In an opposing affidavit by Plotz, HUV Cape Spice admitted that it was not a legal person in the form of a company registered in Germany but stated that its proper description is that of 'a firm or business duly registered in Germany in accordance with the (German) Trade Regulation Act'.

- [4] The respondent's application for leave to appeal to the SCA was subsequently refused.
- [5] Plotz, who deposed to the launching affidavit in this application, explained that he founded a sole proprietary business in Germany in 1994. This business was duly registered as a firm in accordance with the provisions of the German Trade Regulation Act in January 1994. The business first carried on a real estate business in Germany. In 2002, after Plotz had duly filed an amendment to the registration of his business in Germany to reflect that the business also traded 'in goods/commodities'. Plotz started conducting his business predominantly from South Africa where he procured spices and had it shipped to Germany for distribution in that country, under the name HUV Cape Spice. This was a continuation of the business which Plotz started in 1994 and Plotz remained the sole proprietor of that business. The registered place of the business and its trading name in Germany remained unchanged. The action against the respondent which culminated in the judgment and order of le Grange, J. arose from the business activities Plotz carried on in South Africa. Plotz further explained that the incorrect description of his business as a company was caused by the fact that he had heard South Africans refer to their business as a company, and that he, through ignorance, erroneously instructed his attorneys at the time the action was instituted against the respondent, that his business was a company. This resulted in the plaintiff HUV Cape Spice being described in the summons as a private company registered in Germany.
- [6] The basis of this application for the provisional liquidation of the respondent is that the applicant is the judgment creditor under case nr 6650/04 against the respondent, that the respondent is not able to pay the judgment debt which at the current rate of exchange of the rand to the Euro amounts to approximately R2m and that the respondent is consequently unable to pay its debts.
- [7] The respondent raises two defences to the application. The first relates to the applicant's locus standi. It is contended that the applicant lacks locus standi to bring the application on two bases, namely: the applicant is incorrectly cited as HUV Cape Spice and that Plotz should have brought the application in his personal capacity. The second defence based on the lack of locus standi is that the judgment creditor in terms of the judgment granted against the respondent under case nr 6650/04 is not the applicant but is in fact a non-existent entity. The applicant is consequently not a creditor of the respondent.
- [8] The second defence raised is that the respondent has not been shown to be unable to pay its debts as contemplated in section 68(c) read with section 69 (c) of the Close Corporation Act.
- [9] The direct factual evidence by Plotz is that the entity, HUV Cape Spice which instituted the action against the respondent and which culminated in the judgment and order by Le Grange J. is in fact no other than Plotz himself carrying the business of which he is the sole proprietor and that it is the same entity as the HUV Cape Spice which has launched the present application for the provisional liquidation of the respondent. This evidence cannot be disputed. The dispute raised by the respondent in regard to the validity of the registration

of the business as a sole proprietorship in Germany was conclusively refuted in reply by the applicant and the further supplementary affidavit filed on behalf of the respondent has not cast any doubt on the validity and the cogency of the registration of the business as a sole proprietaryship in Germany.

- [10] It is contended, however, on behalf of the respondent that the applicant must be cited as Plotz in his personal capacity and not as HUV Cape Spice. There is no merit in this contention. The provisions of Rules 14(1) and (2) of the Rules of Court, read together, provide that a 'business . . . carried on by the sole proprietor thereof under a name other than his own', is a 'firm*' which may sue or be sued in its own name. The first point raised in respect of the applicant's focus standi does not succeed.
- [11] The second point raised in regard to the applicant's locus standi, is that the applicant cannot rely on the judgment and order granted by le Grange J against the respondent. While the respondent cannot and does not seriously dispute the factual allegations made by Plotz, it is contended on behalf of the respondent that such evidence does not assist the applicant because the plaintiff in the action is ex facie the summons, a company, which is not only a separate legal entity, but also one, which it is common cause, does not exist. It is therefore contended that not only can the applicant not bring the application on the basis of the judgment, but that the judgement is, in any event, in itself a nullity because it was granted in favour of an entity in the form of a company, which does not exist.
- [12] In my view the contentions on behalf of the respondent is based on a fallacy. The description of a party to a suit does not immutably determine the nature and identity of a party. The law reports are replete with instances where the incorrect description of a party was allowed, in the absence of prejudice to the other parties involved, to be changed to reflect the true state of affairs See for instance, *Four Tower Investments fPtv) Ltd v Andre's Motors* 2005(3) SA 39 (NPD). In an action in the magistrates' court which went on appeal to the High Court, the plaintiff was cited in the summons as a company Shortly before the hearing of the appeal, it was established that the plaintiff was in fact a close corporation. The plaintiff then asked for an amendment on appeal to change the citation of the plaintiff from that of a company, to a close corporation. The defendant resisted the application for the amendment on the basis that since the plaintiff as cited was a non existent entity, the summons was a nullity and that in any event, the service of the

summons, not having been issued and served at the instance of the plaintiff as a close corporation, even if the summons were not a nullity, did not interrupt prescription. On the evidence which showed that it was the close corporation which had acted throughout and that the citation was in fact nothing but a misdescription of the plaintiff, the amendment was allowed.

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[14] The issue in this application is whether the applicant is the judgment creditor in terms of the judgment of le Grange. J. The evidence in this application shows that that is indeed the case and that the applicant is in fact the same entity as the plaintiff in the action and is therefore, the judgment creditor. The applicant therefore has the necessary locus standi to bring this application, as the judgment creditor, for the provisional liquidation of the respondent, who is the judgment

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provisionally wind up the respondent. The contention that the liquidation of the respondent will not be to the advantage of creditors such as Mr. Adams does not constitute a valid objection to the winding up of the respondent. It follows that the respondent must be placed under provisional liquidation.

[16] I consequently make an order:

It is ordered that:

1. Respondent is placed under a provisional order of liquidation in the hands of the Master of the High Court;
2. A rule nisi is issued calling upon all persons concerned to show cause, if any, to this Court at 10h00 on Wednesday 27 July 2011, or so soon thereafter as counsel may be heard, why:

2.1. The respondent should not be placed under a final order of liquidation; 2.2. The costs of this application, including the costs of the opposed application on 5 May 2011, should not be costs in the liquidation.

3. Service of this order be effected: 3.1. On the respondent at its registered address; 3.2. By one publication in each of the Cape Times and Die Burger newspapers: 3.3. On the South African Revenue Services W J LOUW Judge of the Western Cape High Court

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W J LOUW

Judge of the Western Cape High Court

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