
SOUTH AFRICA / JUDGMENT

Legion Lock & Cable CC and Another v Legion Computer Accessories (PTY) LTD and Another (72623/2016) [2018] ZAGPPHC 763 (5 October 2018) [2018] ZAGPPHC 763

COURT

North Gauteng High Court, Pretoria

BEFORE

N V Khumalo

CASE / FILE NUMBER

72623/2016

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA

CASE

NO : 72623/2016

NOT

REPORTABLE

NOT

OF INTEREST TO OTHER JUDGES

In

the matter between:

LEGION
LOCK & CABLE CC
1st PLAINTIFF
SONIA
VAN DER MERWE
2nd PLAINTIFF
and
LEGION
COMPUTER ACCESSORIES (PTY) LTD 1st DEFENDANT
JACO
FOURIE
2nd DEFENDANT

JUDGMENT

KHUMALO J

INTRODUCTION.

- [1] The Plaintiffs, a company called Legion Lock and Cable (the pt Plaintiff) and Sonia Lee Van Der Merwe (" Van der Merwe "), the 2nd Plaintiff, instituted an action against Legion Computer Accessories (Pty) Ltd, the 1st Defendant, and its sole director and owner Jaco Fourie ("Fourie"), the 2nd Defendant, which constituted of 2 claims. In the first claim ("Claim 1") the Plaintiffs claimed against the Defendants a payment for damages in an amount of R3 546 461.00 alternatively of R3 022 238.00. In the second claim ("Claim 2") Van der Merwe is seeking a declaratory order against Fourie that he is personally liable (in his personal capacity) for payment of the amounts of R1 750 000.00 and R 750 000.00, plus interest thereon payable from 1 March 2012 and 1 September 2012, respectively which amounts are owed to Van der Merwe by the Trust.
- [2] The amounts in Claim 1 are alleged to be for damages that the Plaintiffs suffered as a result of Defendants' unjust enrichment from Fourie's conduct. The amounts in Claim 2 are payable to Van der Merwe

in terms of an Arbitration Award that was granted in her favour and made an order of court against the J M Fourie Trust. Fourie, together with his wife, is a trustee of J M Trust ("the Trust"). He is accused of fraudulent or reckless conduct that was intended and said to have frustrated and prevented the payment of the amounts to Van der Merwe by the Trust, thus an order sought against him to be held personally liable.

BACKGROUND

FACTS

- [3] Van der Merwe ("Van der Merwe"), was the holder of 100% member's interest, therefore a sole member of Legion Lock & Cable CC, ("Legion Lock"), the 1st Plaintiff, a Close Corporation that specialised in computer accessories . Legion Lock was a family business that she ran on her own after the demise of her family with whom she co owned the business. On 11 August 2011 Van der Merwe sold her 100% member interest in Legion Lock business to the Trust that was represented by Fourie, for the purchase price of R4 550 000.00.
- [4] The purchase price was payable in three (3) instalments. The first instalment of R2 050 000.00 was due and payable on signature of the sale agreement, the second instalment of R1 750 000.00 on 1 March 2012 and the last instalment of R750 000.00 on 1 September 2012. The two deferred payments were payable subject to a suspensive condition that Legion Lock's two major clients, that is Axiz Workgroup and Tarsus Technologies, are to be retained by Legion Lock to the satisfaction of the purchaser under the same trading conditions and with the current products of the business.
- [5] The Trust paid the first instalment of R2 050 000.00 as agreed after which the 100% member interest in Legion Lock was registered in its name and Fourie, as the Trust's representative , took over the control and running of Legion Lock. Afterwards Fourie refused to pay the remaining instalments on the agreed dates, disputing that the suspensivecondition has been fulfilled whilst Van der Merwe insisted that the condition was fulfilled and the amounts due and payable to her.
- [6] To resolve the impasse the parties, Van der Merwe and the Trust agreed on arbitration. On 23 April 2013, Van der Merwe was granted an Award for the balance of the outstanding purchase price payable as set out in Claim 2. Van der Merwe proceeded on or about 25 July 2013 to launch an application for the Arbitration Award to be made an order of court.
- [7] Although on 9 September 2013, the date the matter was set down for hearing, Fourie requested a postponement indicating that the Trust opposes the Application and was to deliver its Answering Affidavit, no opposition papers were filed . On 5 November 2013 the award was thereby made an order of court, unopposed.
- [8] The Trust failed also to satisfy the judgment/order or to pay any part of the outstanding balance. As a result on 13 December 2013 Van der Merwe executed and attached the Trust's 100% member's interest in Legion Lock, following a Nu/la Bona Return on an attempt to execute against Trust's assets. Fourie in the meantime had sold and ceded all the assets and operations in Legion Lock to Legion Computer, the private company in which he is the sole director. Legion Lock was left only a shell.

[9] The Plaintiffs are as a result in this action now claiming the amounts from Fourie in his personal capacity and have made the following summarised averments in their particulars of claim, that:

[9.1] Van de Merwe had on 19 September 2013 come to the knowledge that Fourie has unbeknown to her on 19 August 2013, registered Legion Computer and thereafter published a letter on Legion Lock's letterhead informing the public and Legion Lock customers that the trading name of Legion Lock business has been changed from Legion Lock to Legion Computer, his new company and the business bank account details also changed to a new bank account that is held at First National Bank. The customers were ordered with immediate effect, to make payments into the new account and place their orders with Legion Computer that was operating from the same business address.

[9.2] The Trust, through Fourie, has persisted in refusing to pay the outstanding amounts as per order of the court . On 23 June 2014 Van der Merwe attached the Trust's 100% member's interest in Legion Lock that she later bought for R300 000.00 at an auction having successfully bided against Fourie. On 6 November 2014, Van der Merwe registered herself as the sole member of Legion Lock.

[9.3] On 2 April 2015 they noticed from a printout from the website of Legion Computer that Legion Lock started trading as Legion Computer

Accessories in 2013.

[9.4] Van der Merwe had on 19 November 2015 become aware that Fourie had in the meantime also on 1 September 2013, acting in his capacity as the representative or alternative as trustee of the Trust, which is the sole member of Legion Lock, transferred all of Legion Lock's assets to Legion Computer . She became aware of the transfers and the nature thereof only when the Defendants filed their Plea in another action that Van der Merwe had brought against Legion Computer under case number 55448/2015.

[9.5] Legion Lock's assets were neither due nor owing to Legion Computer who did not pay for the assets, alternatively Legion Lock received neither a benefit nor a fair value from Legion Computer for the alleged purchase transactions as concluded by Fourie, purporting to act on behalf of Legion Lock, Legion Computer and the Trust simultaneously.

[9.6] The transfer of the Legion Lock assets to Legion Computers was with the sole purpose of prejudicing Van der Merwe in her attempt to enforce the payment by the Trust as per the order of the court. The assets were neither due nor owing to Legion Computers. Legion

Computers did not pay for the assets it received, so no benefit was received by Legion Lock for the alleged purchase transactions

concluded by Fourie purporting to act on behalf of Legion Lock, Legion Computer and the Trust simultaneously.

[9.7] Notwithstanding demand, Fourie and Legion Computer failed and or refused to pay the said amounts to the Plaintiffs.

[9.8] The damage to Legion Lock and Van der Merwe was brought about due to the fraudulent, alternatively gross negligent and reckless conduct

of Fourie, acting at all relevant times, simultaneously for Legion Lock, Legion Computer and the Trust with the intention to cause prejudice and damages to Legion Lock and Van der Merwe, alternatively, he should have and could have foreseen the prejudice and the damages to Legion Lock and Van der Merwe had he exercised reasonable care where he under the circumstances should have, but had failed to do so and continued to act with disregard of the implications and outcome, to the detriment of the Plaintiffs.

On Claim 1

[9.9] The auditor's report on the financial position of Legion Lock as from 28 February 2011 to 31 July 2013 reflected an accumulated profit of R3 546 461.00, inventories of R1 456 730.00, cash and equivalents of R780 001 .00 and a loan amount of R171 384 . 00.

[9.10] As a result Legion Computers in which Fourie was the sole director and Fourie were unjustly enriched by R3 546 461.00 alternatively by R3 022 238.00 at the expense of Legion Lock and therefore of also Van der Merwe.

[9.11] Wherefore the Plaintiffs are claiming judgment against the Defendants for the payment of the amount in Claim 1.

On Claim 2

[10] The Plaintiffs further made the following averments that are briefly set out hereunder and not disputed by the Defendants, that:

[10.1] At all relevant times Fourie represented the Trust when the sale of Van der Merwe's interest in Legion Lock was concluded by the Trust.

[10.2] On 1 September 2013 Legion Lock, duly represented by Fourie and the Legion Computer duly represented by Fourie entered into a written contract in terms of which Legion Lock sold its moveable goods to Legion Computers for a purchase price of R678 335.00 that was payable and paid on 2 November 2013 upon which Legion Computer took delivery and became owner of the movable goods.

[10.3] On 1 December (an error: that is in September) 2013 Legion Lock represented by Fourie and Legion Computer also represented by Fourie

entered into a written deed of cession in terms of which Legion Lock ceded its right, title and interest in and emanating from the Legion name, mark associated with the name and any goodwill attached thereto, to Legion Computers against payment by Legion Computers to Legion Lock of an amount of R1.00 on the signature date of the cession agreement.

[10.4] Fourie paid to Legion Lock the amount of R1.00 whereupon the right, title and interest to and emanating from the Legion name, the mark associated with the name and any goodwill attached thereto were ceded to Legion Computer by Legion Lock.

[10.5] At the time of the conclusion of the contract of cession and transfer of assets, Fourie was the sole director of Legion Computer and a Trustee/of the Trust and a representative member trustee in Legion Lock. When he entered into the contracts he knew and intended,

alternatively, should reasonably have foreseen, that Van der Merwe would not be able to lay claim on the business and or the assets of the Trust, being inter alia the business and assets of Legion Lock.

[10.6] Fourie, by causing Legion Lock and Legion Computer to enter into these agreements intended to cause Van der Merwe harm by divesting Legion Lock effectively of all its assets, knowing that a debt was owed to Van der Merwe by the Trust that holds the member's interest in Legion Lock or in circumstances where it was fraudulent, alternatively reckless to do so.

[10.7] The Trust, through the personal conduct of its Trustee, Fourie, fraudulently, alternatively recklessly avoided its legal obligation to make payment to Van der Merwe in accordance with the court order by inter alia entering into, alternatively causing Legion Lock and Legion Computers to enter into the 2 agreements.

[10.8] The agreements were entered into at the hands of Fourie with a fraudulent purpose, alternatively recklessly or at the very least an abuse of the sui generis personality of the Trust and the corporate personality of Legion Lock and Legion Computers, for the following reasons (in that):

[10.8.1] The agreements were (to Legion Computer and Fourie) dispositions without value;

[10.8.2] The assets of Legion Lock were not sold to Legion Computer for a reasonable and market related price. At the time of the sale of Legion Lock assets to Legion Computer, alternatively on or about 31 July 2013, Legion Lock had an accumulated profit of R3 546 461.00;

[10.8.3] The effective sale of the business was not advertised as prescribed by s 34 of the Insolvency Act, 24 of 1936, and at all relevant times dictated by Fourie;

[10.9] Fourie at the time of the agreements knew about the Arbitration award and knew that the Application to make it an order of court was pending. He had requested it to be postponed with a fraudulent purpose to finalise the secretive sham agreements;

[10.10] After the agreements Fourie continued to conduct the same business as Legion Lock in Legion Computer, having left Legion Lock behind as an empty shell.

[10.11] By entering into these agreements Fourie intended and succeeded to prevent Van der Merwe from attaching any assets of Legion Lock that effectively belonged to the Trust.

[10.12] He acted fraudulently, alternatively recklessly acting as the puppet master of the Trust, Legion Lock and Legion Computer to avoid

paying the debts of the Trust, whilst at the same time keeping Legion Computer operating the business of Legion Lock as normal.

[10.13] Due to Fourie's fraud, alternatively recklessness conduct, he should be held personally liable in favour of Van der Merwe for the

due compliance with the Court Order. He also caused Legion Lock and Van der Merwe to approach the High Court with this action procedure

to obtain legal redress. It would therefore be fair and in the interest of justice that Fourie be personally liable and also pay the costs of this action to ensure that Van der Merwe is not left out of pocket.

[11] The Defendants have in response to the action raised in their Plea, two (2) Special Pleas.

First Special Plea (Claim 1)

[12] In respect of claim 1, the Defendants contend that since the Plaintiffs had alleged in the particulars of claim that Fourie acting in his capacity as trustee of the Trust, and in the Trust capacity as the sole member of Legion lock transferred all of Legion Lock's assets to Legion Computer on 19 August 2013, Legion Lock therefore had knowledge of the transfer on 19 August 2013. The summons was served on 16 September 2016, more than three (3) years after the alleged date upon which the alleged transfer took place, which Plaintiffs allege to have given rise to the unjustified enrichment claim. On that basis the Plaintiff's claim for the alleged unjustified enrichment due to the transfer of assets has in terms of s 11 of the Prescription Act 68 of 1969 (Prescription Act) become prescribed.

Second Special Plea (Claim 2)

[13] In respect of Claim 2 the Defendants point out that it averred in the Plaintiffs particulars that Fourie acted fraudulently, alternatively recklessly, acting as a puppet master of the Trust to avoid paying the debts of the Trust and accordingly Van der Merwe claims from Fourie personally, the amounts of R1 750 000 and R750 000.00 that were payable on 1 March and 1 September 2012 respectively and the costs of the arbitrator. The summons were served on Fourie on 16 September 2016, more than three (3) years having lapsed since payment of the two amounts became due, owing and payable to Van der Merwe. Van der Merwe's claim as pleaded besides it not being tenable in law has become prescribed in terms of s 11 of the Prescription Act 68 of 1969. The Defendants therefore pray for the dismissal of Van der Merwe's claim with costs.

On the Merits

[14] The Defendants allege that the trading conditions in respect of the two major clients Axiz and Tarsus varied (changed), in which event the Trust placed the fulfilment of the suspensive condition in dispute. As a result of the suspensive condition not

being fulfilled the Trust was not obliged to make payment of any further amounts to Van der Merwe in terms of the agreement.

[15] Furthermore the Defendants deny that during the period after Fourie had sought a postponement and whilst the arbitration award was

pending to be made into a court order, Fourie registered Legion Computer. They admit and accept the Legion Lock letterhead under cover of which the notification of change of name of the business and account is made to customers, but had refrained from commenting on the content of the notice.

[16] The Defendants however deny that Annexures SV 6 and SV 7 upon which the amount of damages are reflected are an Auditor's calculation, also that it is a correct reflection of Legion Lock financial

position or analysis for the period 28 February 2011 to 31 July 2013.

[17] They plead that on 1 September 2013 Legion Lock and Legion Computer both represented by Fourie, entered, into a purchase agreement in terms of which Legion Computer purchased from Legion Lock its movable assets against payment of R678 335 .00, a market related price, on or before 2 November 2013 and also signed an agreement ceding the Legion name, mark and goodwill attached thereto to Legion Computer for R1 .0 0, which constitute a market value in the ordinary course of business. Further that Legion Lock was at all material times a party to the sale of its movable assets and the cession of the right, title and interest in and to the Legion name to Legion Computer. Legion Lock was aware and had full knowledge of these transactions and the transfer of both the movable goods and the cession as at 1 September 2013.

[18] They further deny that Fourie intended to prejudice Van der Merwe in her attempt to enforce the court order. But allege that both

agreements were concluded in the ordinary course of the business, the assets sold, the Legion name, mark associated with the name and goodwill ceded to Legion Computer at a market price/ value.

[19] They confirm that when the sale of assets and cession agreements were concluded Fourie was the Trustee of the Trust and the director of Legion Computers. They deny that Fourie was ever a member of Legion Lock.

[20] They also deny that business or assets of Legion Lock were ever the assets of the Trust or that there is a basis in law upon which

Van der Merwe can lay claim on the business or assets of the Trust. They argue that the proposition that the business and or assets of Legion lock are the business and assets of the Trust is untenable in law.

[21] They deny that Fourie was a party to either the written agreement of sale or cession entered into between Legion Lock and Legion

Computers. They state that in legion Lock, at all material times he only represented the Trust as trustee that was a member of Legion Lock and represented Legion Computers in his capacity as director at the time of the conclusion of the agreements of which there is nothing wrong in representing the Trust and the entity simultaneously.

[22] They deny that Fourie divested Legion Lock of any assets and plead that the allegations are baseless, meritless and without any substance, also malicious, vexatious and defamatory. They aver that at the time the sale agreement and cession were concluded, the Trust was the sole member of Legion Lock and accordingly authorised to enter into the agreements whereby it disposes of some or all of its assets.

[23] They submit that Legion Computer paid the market value for the assets, the right, title and interest in the Legion name, alternatively the value of these assets and the Legion mark as recorded in the books of account of Legion Lock. At the time the agreements were entered into, Van der Merwe had no authority or say over Legion

[32] At the commencement of the trial proceedings, Mr Zietsman representing the Plaintiffs, indicated to the court that Claim 1 is withdrawn and the Plaintiffs to tender the wasted costs. The matter therefore proceeded only on Claim 2 against which there was a Special Plea of Prescription that was to be considered first, followed by the determination of the matter on the merits.

Issues

to be determined

[33] The primary issues to be determined that were apparent at the beginning of the trial were:

[33.1] Fourie's Special Plea of Prescription against Claim 2, that is whether when summons were served on Fourie on 16 September 2016, Van der Merwe's claim for the amounts of R1 750 000.00 and R750 000.00 as against him had expired.

[33.2] The Plaintiff had to prove the alleged fraud, that is facts or Fourie's conduct that establishes fraud or from which an inference of fraud can be drawn.

EVIDENCE

[34] Van der Merwe and Legion Lock, the Plaintiffs, were represented by Mr C Zietsman and Mr Fourie, the 2nd Defendant was represented Mr W Wannenburg. Van der Merwe testified on her behalf, being the only witness to testify in the trial. No evidence was led to support the version that was put forward to the Plaintiff as that of the Defendants, specifically Fourie, and the averments made in their Plea.

Plaintiff's evidence

[35] Van der Merwe who had since relocated to Australia from September 2012 confirmed that Legion lock was previously a family business that she ran with her parents and brother each owning 25 % member's interest from 1998 until the family's tragic killing in 2005. She carried on running the business holding a 100% members interest until 2011 when she put the business up for sale. Fourie had an interest. She was initially personally involved but later handed over to her auditor, Peter Chown to facilitate the transactions. Fourie put in an offer of R4.5 Million. Discussions ensued between herself, Chown and Fourie who indicated that he was representing the J M Fourie Family Trust that was interested in purchasing the entire business, a walk in and walk out sale of 100 % member's interest. Fourie did a due diligence on the business prior to the sale agreement being reduced to writing.

[36] The first instalment was payable on the date of signature. 2nd payment six months later and last payment on 20 September 2012, 12 months after the first payment . Fourie paid only the slt amount in August 2011, that was payable on the date of signature. The balance was not paid since Fourie was of the opinion that the suspensive condition was not met. She was shocked when she heard that, because according to her she had met all the conditions. After letters went back and forth the parties agreed on arbitration to resolve the impasse, with no right of appeal. The outcome at Arbitration was in her favour and the Trust ordered to pay the outstanding

amounts to her with interest plus arbitration costs.

[37] The Trust did not comply with the order of the arbitrator and she therefore took further steps. She had purchasers lined up who were prepared to buy the business and pay the outstanding amounts to her. As to her knowledge the Trust was effectively the owner of the members' interest, Fourie declined the offers on behalf of the Trust.

A decision was then made to launch an Application on 25 July 2013 for the Arbitration Award to be made an order of court. The Trust opposed the Application delaying the process until the order was made on 5 November 2013. After the order she unsuccessfully tried to attach the assets of the Trust but was told that there was a *nu/la bona* return and thereafter attached the Trust's member's interest in Legion Lock. She thereafter purchased the interest at an auction

for R350 000.00 excluding Vat. The interest was registered in her name. She afterwards found out that Legion Lock had no

assets at hand.

[38] In July and August 2013, she was introduced to a third party, a potential purchaser of the business. Fourie was interested to consider such a 3rd party's offer. Before then they were involved in an action where they were asking that the Trust pay the arbitration award of which there was no dispute pending anymore. She confirmed that there was an email that was forwarded to her by a lady who worked for Legion Lock's landlord due to this lady being aware of the

problems relating to the sale of Legion. The email had a notice for amendment of the details of the business, following the name and the bank account. When she received the email she then understood why Fourie was reluctant at the time, he was busy transferring the bank account into a new account. She told her attorneys she had got Fourie, as she has been highly suspicious that he was unlikely to reject the 3rd party's offer and pay what the arbitrator had ordered. At that time nothing was coming from his attorneys to indicate the direction the Trust was going. They were not informed at all that a new company was being formed, outside Legion Lock until she found out via the email.

[39] During the sale of the business to the Trust she had sent out an

email account to Fourie but did not change the password, so the emails were still coming to her. She probably received the information on 19 or 20th August 2013 and conveyed it to her attorney. She asked him to tell Fourie's attorneys who were also the Trust attorney that they suspect something untoward was taking place. The Trust's attorney denied that they were disposing any of Legionlock's business interest and alleged that she was being misled

by her emotions. In Sept 2013, Mr Morne Mostert one of the partners from her attorneys of record gave her a copy that indicated that Fourie had already registered a private company. Mr Mostert represented her in the meeting that took place during that time in September 2013.

[40] The Purchase agreement of Legion Lock's assets came to her attention for the first time in November 2015 when a Plea was filed in a different matter. They discovered that the agreement to sell Legion Lock's movable assets and the inventory was already signed by 1 September 2013 and they were not consulted. She rejected the allegation that Legion Lock's assets were worth R600 000.00, and indicated that she would not have sold it for that price. The goodwill was worth more than the R1.00 it was sold for. According to her if she had known she would have instructed the attorney to urgently stop the sale. She did not understand why but does not find it surprising that Fourie did that. She said afterwards when she bought Legion Lock's 100% member's interest at the auction, there was nothing left. There were no assets and the money was already transferred. She therefore could not conduct any business from Legion Lock. She had assumed in the beginning when she received the 1st payment that Fourie was honest. When he did not pay the 2nd instalment her view about him changed. She regarded his conduct despicable. She still as at date of her testimony, 19 July 2017, had not received the balance of the money from the arbitration award. The assets in Legion Lock do not exist anymore since Fourie had the assets and the money transferred to another company, in a well-executed plan that he orchestrated.

Agreements were entered into on behalf of Legion Computer, Legion Lock and the Trust by him. She was supposed to be able to access the assets from the Trust.

[41] Under cross examination she confirmed that it was because of the two agreements that Fourie was personally liable. She was not able to receive the balance from the Trust since Fourie had sold the assets from Legion lock to himself. It was put to her that what she wants is not achievable from the Trust as she received membership interest in the legal entity. She indicated that Legion Lock had assets belonging to it when she sold it to the Trust. It was put to her that she sold the member's interest in Legion Lock and not the assets. She said assets were also in the agreement and owned by Legion Lock. It was put to her that it is the Trust that owed her the money according to the Award, not Legion Lock. So if Legion Lock did not pay her she was supposed to follow the Trust. The member's interest belong to the Trust not the assets. It was therefore irrelevant whether the assets were sold or not, the effect does not mean that she could not claim the assets and execute against the Trust. The trust still owes her the money. The state of the assets have no bearing on what is owing. Membership interest back to her and none of the assets was sold as they belong to Legion Lock.

[42] She responded that in her humble opinion what she had observed was

that Fourie behaved unethically, dilly dallying and running away from paying her. It is Fourie who told the sheriff that there were no assets in the Trust. It was put to her that the contract does not say Fourie should pay her when the Trust cannot. She said Fourie was personally liable as he was in charge of Legion Lock, the Trust and Legion Computer. He was in charge of funds received and paid and behaved unethically in his personal capacity. It was pointed out to her that Fourie was a trustee not a faceless entity that could hide behind the curtain of the Trust. She said she could not indicate but she could infer (draw an inference) Fourie's fraudulent behaviour. She said she concludes that to have a potential purchaser who could pay the Arbitration Award and Fourie to resist the sale and go and sell the assets to his company that is where she infers Fourie's fraudulent behaviour. Legion Lock represented by Fourie, sold to Legion Computer represented by Fourie which was a fraudulent agreement according to her.

[43] Van der Merwe confirmed that she was aware of the difference between private persons, natural persons and an entity that is liable. She was the sole member of Legion Lock which was the owner of certain movable assets. She confirmed that a CC can sell its assets as it needs. She qualified that by alleging that, as an entity it needs an instruction from a person, it cannot do it on its own.

[44] Furthermore Fourie indicated that the reason the Trust did not pay was because the 2 Companies that were to remain as clients of Legion Lock and continue to do business in the same way did not. She had information that it was not true . Instead Fourie had in the meantime sold the assets of Legion Lock. She pointed out that Fourie acted as both seller and purchaser, selling the assets and the brand for a lot less than what it was worth. Also it did not make sense that he bought the CC for R4,5 Million and would then sell it for R1. 00 . (for his personal benefit) .He is the one who prepared the documents for the transaction as

well.

[45] She confirmed that she believed that if the Trust cannot pay her she can attach the Trust's assets in Legion Lock, which was an advise she got from her attorney. She said she does not have expert

information however when she bought back the member's interest in Legion Lock that entitled her to look its financials and therefore at the amount drawn by the trustees for that period, whether it was not enough or far too cheap.

[46] 2 years prior the same price was paid for the same amount. She said

she sold her membership interest including the movables. She disputed that the agreement dealt only with the movables, but argued that the price was for movables and the stock in hand. Having regard to the financials the concept of willing buyer and willing seller, she said when the purchaser and the seller are one and the same person, the R678 000 cannot be reasonable as it was not a market related price

and therefore deceitful. The brand and the goodwill were not specified in the financials. They are not tangible as they belong to Legion Lock itself. It was put to her that Legion Computer was allowed to use the name with the cession. She agreed that Legion Lock would still continue to use the name. The fact that Legion Lock was sold did not mean that they could also use this name. She said its sale was of significance because at that stage Legion Lock was now a shell. She declined to answer whether she meant that if the trustee represents the seller and the purchaser, there would not be an agreement.

[47] According to her because the Trust did not pay, someone else has got to pay. She was upset that the Trust did not pay as it always has been its obligation to pay, but after she had seen the sale and cession agreement and Fourie seemed to be the one person representing everything, it did not seem possible that the Trust will ever be able

to pay and so she also took advise from her attorney. She did believe that the Trust owe her money and as Fourie represented the Trust and on advise of Counsel they made a claim against Fourie. She said at the time she already knew about the letter of the public notice, but was not aware that Legion lock had also become dormant and had no assets. She only then realised later what was happening.

[48] She confirmed that she only received the letter on the changes in name and bank details in September 2013 and the two agreements she received them in November 2015. There was an attachment received with an email on Thursday 19 September 2016. She confirmed that she still had a password but the timing of the letter was not the same. Although the letter shows that a new company was being formed by Mr Fourie not by the Trust, to her Fourie and the Trust were one and the same person. She had taken advise from her Counsel that Fourie as a trustee and his personal capacity is one and the same person. Both entities were still managed by Fourie because he was involved in both. She said she did not know all the particulars in 2013 except what the letter from the attorney dated 20 September 2013

details. It was about the registration of Legion Computer and Fourie's lack of bona fides. She said there were no assets in Legion Lock therefore it could not be liquidated. She sold it whilst it was still in business but when she bought it back, there were no debts or liabilities. The only thing the Trust had were debts, however at no time was the Trust sequestrated. When she bought Legion Lock back it had not continued with the business since there was nothing to continue with. Once she has handed over Legion Lock to Fourie, the latter made no misrepresentations to her. When assets were sold from Legion Lock to Legion Computer Fourie did not act recklessly in terms of his own Trust. Personally he acted recklessly as he failed to pay her (as the creditor) with Legion Lock selling to Fourie's company Legion Computer all its operations. She was aware of Mr Fourie and his wife being the two trustee and also noted that the Trust had its own banking account.

- [49] She confirmed that Fourie was at the auction bidding to buy back Legion Lock's member's interest, acting fraudulently, so that she may not be able to access the financial statements. If Fourie was not there she could have bought back the member's interest for something less. It was put to her that the amount should reduce the amount owed to her. Which she did not agree with. She disputed that Fourie was bona fide. She also agreed that the potential buyer rejected by Fourie was well known in the IT industry but he was not known by her attorneys when she gave them the number.
- [50] In reexamination she confirmed that in the previous action she did not sue Fourie. She said she became aware of the two agreements in November 2015. The previous action was instituted before 15 November 2015. She said she would not have placed a bid for the members interest in Legion Lock if she was aware at the auction of the two agreements that alienated the assets, plant and equipment, goodwill and the cash assets in the bank account . She did not get back what was in the member's interest at the time she sold Legion Lock for R4.5 Million. Bidding was in 2014, whilst she became aware of the formal letter of notice of changes in 2013. For the duration of the letter she was not aware.
- [51] At the end of the Plaintiffs' case the Defendants asked for absolution from the instance on the basis that there is no prima facie evidence before the court upon which the court can find for the Plaintiffs. The Defendant's Counsel argued that Van der Merwe could not prove that actual fraud committed, which is that Fourie acted fraudulently towards her. He argued that Van der Merwe actually conceded and at no stage did she say Fourie made misrepresentations to her. He further argued that if the court has to draw an inference from facts they do not support the inference of fraud. A representation by the other party conceded to was that it was not him personally but the Trustee. She therefore could not prove fraud. Whether do/us eventualis or representation for direct fraud. There was no misrepresentation whether by Trustee or Fourie personally for damages suffered there must have been a liability a duty to disclose.

[52] I had found in favour of the Plaintiff that there was a prima facie case made on the facts upon which a reasonable inference can be drawn that the conduct of Fourie was fraudulent / reckless with an intention to deprive or frustrate Van der Merwe in her endeavour to enforce the award that was made an order of the court. Therefore

there was a prima facie that needed an answer. The reasons are recorded and some detailed in the findings made at the conclusion of the trial, since thereafter the Defendants closed their case. Although Fourie was available he refused to testify.

ANALYSIS

[53] On Prescription, the claim is against Fourie personally and not against the Trust. The court had therefore to determine the issue of prescription from the context of Fourie's alleged liability. The circumstances that had to be taken into account were those alleged to have given rise to the cause of action against him. The relevant provisions of the Prescription Act 68 of 1969 ("the Act") on s 9 read:

"(

1) Subject to the provisions of ss (2), (3) and (4), prescription shall commence to run as soon as the debt is due.

(2)

(3) A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and the facts from which the debt arises: provided that the creditor shall be deemed to have such knowledge if he could have applied it by exercising reasonable care." (my emphasis)

[54] Fourie's Counsel had argued from the common cause facts, that Van der Merwe's claim arose and became due and payable when the outstanding balances were not paid in March 2012 and September 2012. It being common cause that the summons were served on Fourie on 16 September

2016. He argued that the debt has as a result prescribed.

[55] The issue that needs to be established as already mentioned is whether or not the claim as alleged against Fourie has prescribed. The enforcement of the debt as against the Trust has already taken place and a Judgment/order obtained, leading to Van der Merwe proceeding with execution against the Trust, upon which there was a Nulla Bona Return. The relevant question in casu is when did the debt/claim against Fourie become due not arise arise? Which question will be determined by the circumstances that gave rise to the cause of action. Importantly, the question is when did Van der Merwe become aware of circumstances that might render Fourie liable? The two being different, it is important to take note that s 12 of the Prescription Act 68 1969 provides that "

[56] In *Benson and Another v Walters and Others* 1984

(1) 73 (AD) at p82 AD

"Section 12 (1) of the Prescription Act 68 of 1969 provides that provides prescription shall commence to run as soon as the debt due." It is clear that the date on which the debt becomes due does not always coincide with the date on which it arises. In *List v Jungers* 1979 (3) SA 106 (A) at 121, DIEMONT JA remarked that the difference relates to the coming into existence of the debt at one hand and the recoverability thereof on the other hand.

[57] Van der Merwe's version is that she became aware of the agreements that have been entered into by Fourie diverting the business (its assets and operations) of Legion Lock, the entity owned by the Trust (by virtue of its holding 100% member's interest thereat) to his company, Legion Computer, only in November 2015, which transfer had prevented and prejudiced her chances of recovery (or of satisfying) of the judgment debt from the Trust. It was therefore argued on behalf of Plaintiff that when Fourie's Plea revealed these facts in an action Van der Merwe instituted against Legion Computer, that is when Van der Merwe became aware of all the facts giving rise to her claim against Fourie and Legion Computer and therefore the date the debt became due.

[58] In the matter of *Truter and Another v Deysel* [2006] ZASCA 16, the Supreme Court of Appeal held that:

"debt due" means a debt, including a delictual debt, which is owing and payable. A debt is due in this sense when the creditor acquires a complete cause of action for the recovery of the debt, that is, when the entire set of facts which the creditor must prove in order to succeed with his or her claim against the debtor is in place or, in other words, when everything has happened which would entitle the creditor to institute action and to pursue his or her claim". (my emphasis)

[59] For the definition of "cause of action" for the purposes of prescription, the court's definition in *McKenzie v Farmers' CoOperative Meat Industries Ltd* 1922 AD 16 at 23 was relied upon by the Constitutional Court in *Links v MEC for Health Northern Cape*

[2016] ZACC 10 which was stated as follows:

"every fact which it would be necessary for the plaintiffs to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved." (my emphasis)

[60] Therefore to trigger the running of prescriptive time, knowledge is required. The facts in *Minister of Finance and Others v Gore NO* [2006] ZA SCA 98 provides a proper clarification of what s 9 intends. In this matter Mr Links, who had dislocated his thumb got it amputated in hospital. He only learnt later when he was consulting with other doctors and gained access to his hospital records became aware that the loss of his thumb was due to the plaster of Paris that was too tight on his arm, fitted by an independent medical professional at the hospital. The Constitutional

Court found that prescription did not begin to run on the approximate date when Mr Links' thumb was amputated, but rather, the date on which he had knowledge of all the facts that caused his thumb to be amputated. Knowledge of the cause of his condition was a necessary material fact that a litigant wishing to sue in a case such as this would need to know.

[61] The sale and cession agreements that Van der Merwe complains about

that were orchestrated by Fourie to divert the assets, trade and goodwill in Legion Lock from the Trust, allegedly to Van der Merwe's

prejudice and frustration in her endeavour to execute against the Trust's member's interest in Legion Lock, although said to have been concluded in September 2013, it is Van der Merwe's testimony that she only became aware of the agreements in November 2015 when they were disclosed in Fourie's Plea for the first time in another action.

[62] am satisfied that the claim against Fourie only arose on the date that Van der Merwe got to know of Fourie's conduct that she alleges was designed to frustrate her enforcement of the judgment she obtained against the Trust, which is in November 2015. Her claim as against Fourie has therefore not become prescribed. The court order was also made on 5 November 2013 that would fall outside the three

(3) year period of prescription.

On the merits

[63] On the merits the question is whether Van der Merwe has made a case for a declaratory order that Fourie is to be held personally

liable for the payment of the amounts payable to her as per the court order; that is whether Fourie's conduct was fraudulent and if so if it accordingly attracted personal liability.

[64] Van der Merwe had alleged that Fourie frustrated and prevented the payment and/or enforcement of the court order by diverting all the rights and title in the name, brand and goodwill and transferring all the assets of Legion Lock to Legion Computers, a private company owned by him, using his position in the Trust as a representative trustee of its interest in Legion Lock, to orchestrate the fraudulent or reckless transfer and cession, that the execution against the Trust could not be effected.

[65] According to Van der Merwe whose testimony was unquavering, Fourie

had used his position as the "representative trustee" in Legion Lock to transfer the assets of the Trust in Legion Lock

knowing that the Trust still owes her the balance of the purchase price for the sale of Legion Lock, averting and frustrating her enforcement of the court order against the Trust, having made these assets unavailable to her by selling them to his company for an amount way less than their market value and ceded the brand name and goodwill for a token price of R1.00. Fourie as the owner and sole

director of Legion Computers, benefited personally from these transactions, without any good reason, abusing his position in the three entities (the sui generis personality of the Trust and the corporate personalities of Legion Lock and Legion Computer).

[66] He, furthermore, when he did so, was aware of the Arbitration award

and the pending Application to make the award an order of court and intended to avert and frustrate her enforcement of the court order against the Trust. He deliberately stalled the making of the order by requesting a postponement when he had no intention to proceed with the opposition but to delay, whilst in the interim he was proceeding with the transfer to his company of the assets and the operations of the business belonging to the Trust, before Judgment could be obtained. The member's interest that the Trust held in Legion Lock was left worthless, without the assets and business operations.

[67] The business operations and the assets of Legion Lock were transferred by Fourie although using his position as the representative trustee, to only benefit himself personally, knowingly leaving the Trust with no prospects of paying its indebtedness towards Van der Merwe. According to Van der Merwe, Fourie's deliberate conduct did not only affect her prospects of recovery, but she was directly prejudiced as her court order/judgment debt could not be satisfied against the interest that the Trust held in Legion Lock. The interest had become worthless and hollow with the business assets and operations deliberately diverted. Having regard to Fourie's established deliberate and dishonest conduct and the prejudice suffered by Van der Merwe as per her uncontested evidence, fraud can clearly be inferred.

[68] Van der Merwe said that Fourie acted with total disregard of the right of recovery (enforcement of the order) she had against the Trust, acting recklessly and fraudulently, in that he even went as far as bidding against her for the member's interest in Legion Lock. He is the only person that benefitted from his fraudulent conduct through his company, not as a trustee but in his own capacity as the sole director and owner of Legion Computer, personal liability should ensue. The assertion is correct as Fourie through his position as a sole director thus owner of Legion Computer, the company to which the business assets and operations were transferred without any just cause, benefited personally from his deliberate dishonest conduct. He did not benefit as a trustee of the Trust, although he orchestrated the reckless and or deceitful deals using his position as a trustee as well. For that reason he cannot hide behind his position as a trustee to circumvent personal liability. The gains went to him as the owner and sole director of Legion Computer, quite clearly which is what he intended by his fraudulent conduct but he was also aware of the order against the Trust and

his conduct also deliberately intended to frustrate Van der Merwe's right as a judgment creditor of the Trust to successfully execute against the rights and interest of the Trust in Legion Lock. These facts indeed support the proposition to hold Fourie personally liable for this debt.

[69] It was argued by Mr W Wannenburg on behalf of Fourie that Van der Merwe conceded that once she has handed over Legion Lock to Fourie, the latter made no misrepresentations to her. She has however testified of the incident of the deliberate delay Fourie caused, whilst in the meantime he diverted Legion Lock of its assets, without her knowing and also about the time when she was advised by the Landlord's employee of the changes Fourie was effecting and she, after seeing the suspicious e mail, asked her attorney to confront Fourie through his attorneys and demand an assurance that he was not going to dispose Legion Locke's interest or assets, threatening to sequester the Trust and also to apply for the award to be made an order of court. She got dismissed by Fourie and his attorneys as being misled or guided by her emotions and was told that Fourie would not act mala fide . The Trust's attorney denied that Fourie would dispose any of Legion Lock's business interests. In Sept 2013, Mr Marne Mostert one of the partners from her attorneys of record gave her a copy that indicated that Fourie had already registered a private company. Notwithstanding the assurance to act bona fide, Fourie proceeded during that time to orchestrate the sale of Legion Locke' s assets and operations on 1 September 2013 and the cession of its brand, name and goodwill to his private company on 1 December 2013, disposing of them anyway. This was prove of a clear misrepresentation . Fourie had also 2 days before such sale, during negotiations, rejected an offer on the sale of the business to a third party from whom Van der Merwe's debt could have been satisfied. The conduct was directly contradictory to the assurance he gave, ma/a fide and constitutes a fraudulent misrepresentation or rather supports a strong inference of fraudulent intent.

[70] Furthermore Wannenburg argued that Van der Merwe had agreed that when assets were sold from Legion Lock to Legion Computer, Fourie did not act recklessly in terms of his own Trust. She had however further responded that it was nevertheless exceptional in an instance where he himself is the trustee transacting with himself as the sole director of Legion Computer whereupon he benefitted his company and indirectly himself and the Trust could not pay her. She said she had drawn an inference that the conduct must have been fraudulent because that happened notwithstanding the arbitration award and it being made an order of court. Fourie personally acted recklessly or rather fradulenty, as he, as a representative of the Trust failed to pay her for the members interest in the business of Legion Lock but diverted the business that comprised of stock, operations and profits to be generated, brand and good name, to his company Legion Computer. The trust was thereupon diverted of its business interest in Legion Locke thereupon diminishing or leaving it without any prospects to settle its indebtedness towards her. This was also clear proof of recklessness or deliberate intent to make the assets unavailable to her.

[71] For that reason it is preposterous that the Defendants in argument

deny that the business or assets of Legion Lock were ever the assets of the Trust or that there is a basis in law upon which Van der Merwe can lay claim on Legion Locke's assets as that of the Trust. Mr Wannenburg had argued that the proposition that the business and or assets of Legion Lock were the business and assets of the Trust is untenable in law. This issue was dealt with during the application for absolution from the instance. Fourie was able as the trustee of the Trust to access and effect the transfer of the assets in Legion Locke due to the Trust's ownership of the member's interest in Legion Lock hence he was able to run and control the assets of Legion Lock. If the trust through its member's interest did not own the assets in Legion it would not have been able to sell them out of Legion Locke.

- [72] The Defendants also contradict themselves since they have also pleaded that "at the time the sale agreement and cession were concluded, the Trust was the sole member of Legion Lock and accordingly authorised to enter into the agreements whereby it disposes of some or all of its assets." By this averment they concede that the trust acquired authority to dispose and transfer ownership of the assets due to it being the holder of the 100% member's interest. In acquiring the 100% member's interest it also acquired ownership and control of Legion Locke and therefore access to its assets and operations making it possible for the trust to sell.
- [73] The end result of all this is that Legion Computer and Fourie its sole director are currently conducting Van der Merwe's business with its assets, goodwill and clients worth R4 500 000.00, diverted from the Trust purportedly for a mere R687 000.00, an acquisition that was obviously orchestrated to intentionally avoid paying the Trust debt and to frustrate Van der Merwe's prospects of satisfying the Judgment she obtained against the Trust.
- [74] From all these facts Van der Merwe has proven fraud or at least proven facts from which an inference of fraud can be drawn. She was honest and unwavering in her testimony and although she was made to concede to conclusions of law which she could not testify to as she is not a legal person, her evidence constituted material and or principal facts that clearly established fraud or alternatively circumstances from which an inference of fraud can be drawn.
- [75] There has been no response by Fourie or anyone on his behalf in the light of Van der Merwe's prima facie evidence which had called for a reply, specifically because a version that was said to be that of Fourie was put to her. In *Ex parte Minister of Justice; In re R v Jacobson and Levy* 1931 AD 466 the court held at 479 that:

"If the party, on whom lies the burden of proof, goes as far as he reasonably can in producing evidence and that evidence 'calls for an answer then, in such a case, he has produced prima facie proof, and, in the absence of an answer from the other side, it becomes conclusive proof, and, he completely discharges his onus of proof'

See also *Hurley and Another v Minister of Law and Order* 1985 (4) 709 (DLD) at 725H. Primarily the Defendant's argument was that the elements or essential of fraud has not been pleaded nor proven. This, as already indicated is not a sustainable argument.

[76] Although in *Gilbey Distillers & Vintners (Pty) Ltd v Morris* NO 1990 (2) SA 217 (SE), it was confirmed that fraud is not easily inferred, the drawing of inference of fraud is in some cases a mere question of law arising upon the facts, in others a mere matter of fact (as it is in *casu*) that can be proven by proving circumstances from which an inference of fraud may be drawn. Fraud therefore cannot be presumed without proof, consequently a presumption or inference will be drawn only when primary facts have been established. There must be a factual basis.

[77] The essentials of fraud even on inference still prevail in that the Plaintiff has still to prove representation or conduct that establishes fraud and 'prejudice actual or potential (causation); see *5 v Graener and Another* 2011 (4) SA 79 (SCA). Fourie's conduct was, as attested to by Van der Merwe supported by the pleadings, unreasonable, deliberate and dishonest, committed in Fourie's own interest and purpose which should be sufficient to attract personal liability. His actions are directly linked to Van der Merwe's failure in her endeavours to satisfy her Judgment/order against the Trust. The prejudice Van der Merwe suffered due to the Trust's inability to satisfy the judgment/court order, was clearly as a direct consequence of Fourie's

conduct.

[78] In *Ex parte Lebowa Development Corporation Ltd* 1989 (3) SA 71 (T), at 101E1, Stegmann J said the following regarding fraud by *dolus eventualis*:

'The essence of fraud involving *do/us eventualis* appears to be the deceit practised by the representor in suggesting that to be true which he knows may not be true. He knowingly exposes the representee to a risk (that the representation may be false) and deceitfully leaves the representee ignorant of his exposure to that risk (my emphasis). When the preexisting cause of action lies against the company alone one of the purposes served by s 424 is to enable the court by its declaration to extend the the company's liability under that cause of action to such persons as may be shown to knowingly to have carried on the company's business or aspects of it recklessly or fraudulently.

[79] These are the circumstances where Smalberger JA's statement in *Cape Pacific Ltd v Lubner D Controlling Investments (Pty) Ltd and Others*

[1995] ZASCA 53; 1995 (4) SA 790 (A) at p. 802F become relevant where he says:

"Equally trite is the fact that a court would be justified in certain circumstances in disregarding a company's separate personality in order to fix liability elsewhere or what are ostensibly acts of the company. This is generally referred to as lifting or piercing the corporate veil. (I shall confine myself to the use of the word piercing) The focus then shifts from the company to the natural

person behind it (or in control of its activities) . If there were no dichotomy between such a person and the company (Henochsberg on the Companies Act (5th ed) vol. 1 at p. 54). In that way liability is attributed to someone who misuses or abuses the principle of corporate personality."

[80] This was however in reference to s 424 of the Companies Act 61 of 1973 whereby provision is made for the court on application, to declare any person who knowingly carried on the company's business recklessly or fraudulently, personally responsible for all or any of the debts or other liabilities of the company. Unless there is already some independent cause of action against the company, s 424 cannot be brought into operation . The section therefore protects creditors from director's conduct in carrying on of business reckless or with an intention to defraud creditors. In this instance, the liable person is liable "without any limitation" for any debts and other liabilities of the company . The mention of the issue

of a preexisting cause of action is vital. Cameron J in *Ebrahim v Airport Cold Storage {Pty} Ltd* (3181/06 [2007] [2008] ZAWCHC 25; 2008 (2) SA 303 (C) said the following regarding the section:

The section retracts the fundamental attribute of corporate personality, namely separate legal existence, with its corollary of autonomous and independent liability for debts, when the level of mismanagement of the corporate's affairs exceeds the merely inept or incompetent and become heedlessly gross or

dishonest."

[81] In *Burley Appliances v Grobelaar N.O. and Others* (2003 (3) All SA 505 © (14 July 2003) Nel J held:

'In my view as soon as it 'appears that any business of the corporation was or is being carried on recklessly, with gross negligence or with intent to defraud any person or for any fraudulent purpose' and the corporation has debts or other liabilities, a creditor can enforce the remedy which was created by s 64. The remedy is the right to apply to a Court for a declaration that a particular person or particular persons should be held personally liable for all or any of such debts or liabilities as the Court may direct'.

[82] The court may direct that such payment be made to a particular creditor as opposed to the company itself. The section referred to created statutory rights and corresponding liabilities when the

business of a CC is carried out recklessly or with gross negligence or with intent to defraud any person or for any fraudulent purpose. This proposition follows the common law as propounded in the decision of *Orkin Bros Ltd v Bell and Others* 1921 TPD 92 that "save where authorised by statute 'our Courts would' at the present juncture' not disregard "the separate identity of companies except upon proof of fraud; see *N Lategan and Another NNO v Boyes and Another* 1980 (4) SA 191 (T) at 201 F 202A. It was said that on the authority of the *Orkin* and *Lategan* case it was quite clear that 'upon proof of fraud, a Court would at the instance of a creditor of a company impose personal liability on those responsible and who would otherwise have been able to shelter behind the corporate faiaide of the company.

[83] The decision in *Land and Agricultural Bank of South Africa v Parker and Others*, (2005 (2) SA 77 (SCA)), is regarded as one of the most important in the South African Law of trusts, an area of law considered dynamic and to be in a continuing state of development. Cameron J A stated thereat that:

"(A) trust is not a legal person. It is an accumulation of assets and liabilities. These constitutes the trust estate, which is a separate entity. But though separate, the accumulation of rights and obligations comprising the trust estate does not have the legal personality. It vests in the trustees, and must be administered by them and it is only through the trustees, specified as in the trust instrument, that the trust can act.'

[84] In 87 he went further to state that:

'It may be necessary to go further and extend well established principles to trusts by holding in a suitable case that the trustees' conduct invites the inference that the trust form was a mere cover for the conduct of the business as before, and that the assets allegedly vesting in trustee in fact belong to one or more of the trustees and so may be used in satisfaction of debts to the repayment of which the trustees purported to bind the trust. Where the trustees of a family trust, including the founder, act in breach of their duties imposed by the trust deed, and purport on their sole authority to enter into contracts binding the trust, that may provide evidence that the trust form is a veneer that in justice should be pierced....'

[85] In *Van Zyl and Another NNO v Kaye NO and Others* 2014 (4) SA 452 (WCC) AT (21) it is stated that:

Going behind the trust form, on the other hand, entails accepting that the trust exists, but disregarding for given purposes the ordinary consequences of its existence. This might entail holding the trustee personally liable for an obligation ostensibly undertaken in their capacity as trustees, or holding the trust bound to transactions ostensibly undertaken by the trustees acting outside the limits of their authority or legal capacity as such: cf *Van der Merwe NO and Others v Hydraberg Hydraulics CC and Others*; *Van der Merwe NO and Others v Bosman and Others*

[86] The concept of piercing the trust's veneer (which in companies is regarded as the corporate veil) or going behind the trust form is regarded as representing the provision by a court of an equitable remedy to a third party affected by an unconscionable abuse of the trust form. It is a remedy that will be afforded in suitable or appropriate cases like in *casu*. Binns Ward J in *Van Zyl* considered it a desirable development in our law and stated that:

"I suspect that , rather like the position with 'piercing of the corporate veil in the case of companies, closely defining applicable principles in the cases in which it is afforded or withheld may prove elusive. That is why I consider it appropriate to describe it as an equitable remedy in the ordinary, rather than technical, sense of the term; one that lends itself to a flexible approach to fairly and justly address the consequences of an unconscionable abuse of the trust form in given circumstances. It is a remedy that will generally be given when the trust form is used in a dishonest or unconscionable manner to evade a liability, or avoid an obligation."(my emphasis)

[87] On the premises I find Fourie's conduct to be the classical case where the equitable remedy as advocated by Binns Ward J would be appropriate. Fourie had benefitted himself although not as a trustee of the Trust, he orchestrated the fraudulent and or deceitful deals using his position as a trustee . For that reason he cannot hide

behind his position as a trustee and the fact that a Trust is not a legal persona, to circumvent personal liability. In such circumstances it would be appropriate for the veneer of a trust to be pierced in the same way as the corporate veil of a company.

Cameron JA in Land and Agricultural Bank of SA, at 91 stated that: "If a legitimately established trust is used or misused in an improper fashion by its trustees to perpetrate deceit, and or fraud, the natural person behind the trust veneer must be held personally liable.

[88] It is therefore ordered that:

1. The 2nd Plaintiff's claim against the 2nd Defendant is upheld with costs.
2. The 2nd Defendant is held personally liable for payment of the amounts of R 1 750 000 .00 and R750 000.00 plus interest thereon payable from 1 March 2012 and 1 September 2012 , respectively that are due and payable to the 2nd Plaintiff in terms of an order of this court dated 1 November 2013 jointly and severally with JM Family trust in terms of the court order dated 1 November 2013 .
3. The 2nd Defendant is to pay the costs of the arbitration proceedings.

N V KHUMALO

JUDGE OF THE GAUTENG HIGH COURT PRETORIA

Delivered on:

Counsel for Plaintiffs: Adv Zietsman SC

Instructed by:

Bornman & Mostert Inc

Ref: Mr Mostert /V6

Tel 012 342 5150

Fax: 012 342 5150

Counsel for Defendants: W Wannenburg

Instructed by:

Bothma & Jooste Attorneys

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