

SOUTH AFRICA / JUDGMENT

Slip Knot Investments 777 (Pty) Ltd v Forlee (3055/2011) [2015] ZAECHGC 58 (15 May 2015)

[2015] ZAECHGC 58

COURT

Eastern Cape High Court, Grahamstown

BEFORE

Chetty

CASE / FILE NUMBER

3055/2011

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE DIVISION, GRAHAMSTOWN)

Case

No: 3055/2011

DATE:

15 MAY 2015

NOT

REPORTABLE

In

the matter between:

SLIP

KNOT INVESTMENTS 777 (PTY)

LTD.....Plaintiff

And

PATRICIA

MAE

FORLEE.....Defendant

Coram:

Chetty J

Heard:

7 May 2015

Delivered:

15 May 2015

Summary: Close Corporation
– Close Corporations Act 68 of 1984 –
Section 26(5) prior to substitution – effect of deregistration
– Member - Personal liability – Member unequivocally
assuming
and accepting personal liability

JUDGMENT

CHETTY J: -

[1] The plaintiff instituted action against the defendant on 13 September 2011 wherein it claimed payment of the sum of R2 830 000,

00 together with interest thereon at the prime lending rate plus 1% a tempore morae. The claim was premised on the provisions of s 26 (5) of the Close Corporations Act[1] (the Act). At the inception of the trial the parties agreed upon a statement of facts in the form of a special case for adjudication

pursuant to the provisions of Rule 33 (1) of the Uniform Rules of Court. Therein the plaintiff's causes of action are synopsized

as follows: -

“(1.1) The first claim, which was introduced by way of an amendment effected on 19 December 2013, is premised on section 26(5) of the Close Corporation Act, 69 of 1984 (the CC Act) (“the main claim”). As such, Slip Knot claims that a close corporation styled Blue Marine Properties CC (registration number: 2008/036263/23) (“Blue Marine”) was indebted to the plaintiff in the sum of R2 830 000, 00 on the date of Blue Marine’s deregistration at which time the defendant, Patricia Mae Forlee (“Forlee”), was the sole member of Blue Marine.

(1.2) The second claim which is claimed in the alternative to the main claim, is premised on an assumption of liability by Forlee (“the alternative claim”). As such, Slip Knot claims that Forlee assumed and accepted liability for the indebtedness of Blue Marine towards Slip Knot and undertook towards Slip Knot to make payment of Blue Marine indebtedness to Slip Knot,”

[2] The agreed facts apropos the main claim are the following:

“(9.1) Blue Marine represented by Forlee, concluded a written agreement of sale with Wonderwonings Eiendomme (Pty) Ltd (“Wonderwonings”)

on 28 August 2008.

(9.2). In terms of the agreement of sale, specifically clause 4.2 thereof, Blue Marine was obliged to effect payment of a deposit in the amount of R2 830 000, 00 to Wonderwonings on 11 September 2008 (being within 14 days after signature of the agreement). The said date was extended by agreement between Blue Marine and Wonderwonings to 17 September 2008.

(9.3) Blue Marine represented by Forlee, approached Slip Knot during August/September 2008 with a request that Slip Knot finance the deposit payable by Blue Marine in terms of the sale agreement. Negotiations ensued between Blue Marine and Slip Knot during

September 2008 as is evident from a facility letter addressed by Slip Knot to Forlee dated 15 September 2008 and a letter addressed by Goldberg & De Villiers Inc, ("Goldberg"), dated 17 September 2008.

(9.4) The negotiations culminated in an agreement being reached, the terms of which were recorded in a letter of Goldberg dated 17 September 2008. The terms of the agreement included the following:

(9.4.1) Slip Knot will issue a bank guarantee for R2830 000,00, being the 10% deposit on the purchase price of the land purchased by Blue Marine from Wonderwonings.

(9.4.2) Blue Marine would sign an acknowledgement of debt in favour of Slip Knot for R2 830 000,00 plus interest at prime plus 1% calculated from date of payment of the guarantee, repayable within eighteen (18) months of payment of the guarantee.

(9.4.3) Forlee would bind herself as surety for and on behalf of Blue Marine,

(9.4.4) A private bond in favour of Slip Knot would be registered over the land purchased,

(9.4.5) Blue Marine will grant Slip Knot an option to enter into a joint venture agreement with Blue Marine, which option Slip Knot had to exercise in writing by 15 November 2008.

(9.5) In pursuance of the aforementioned agreement, Slip Knot instructed its bank, Investec Bank Limited ("Investec"), to issue a guarantee on Slip Knot's behalf in favour of Wonderwonings in the amount of R2 830 000,00.

(9.6) In pursuance of the instruction, a guarantee was issued to Wonderwonings by Investec on Slip Knot's behalf on 17 September

2008 ("the first guarantee").

(9.7) The first guarantee was rejected by Wonderwonings on the basis that it was not unconditional and irrevocable. The said rejection lead to further negotiations between the parties during which it was inter alia agreed that Slip Knot would request Investec to amend the guarantee on the condition that Wonderwonings' attorney, Mostert & Bosman Attorneys, give an undertaking that they will not demand payment of the guarantee prior to registration of transfer of the property into the name of Blue Marine, unless Blue Marine breaches its obligations in terms of the sale agreement. The negotiations further lead (sic) to an addition to the agreement dated 17 September 2008, which addition was recorded in a letter by Goldberg dated 19 September

2008.

(9.8) As a result, Slip Knot instructed Investec on 22 September 2008 to amend the guarantee. The amended guarantee was issued on 22 September 2008 (“the second guarantee”). Mostert and Bosman again refused to accept the guarantee on the basis that it was not unconditional and irrevocable. Slip Knot agreed to further amend the guarantee and instructed Investec accordingly. Accordingly a further amended guarantee was issued by Investec on behalf of Slip Knot on 23 September 2008 (“the third guarantee”). The third guarantee was accepted by Mostert and Bosman.

(9.9) Slip Knot did not exercise the option granted to it by Blue Marine to enter into the joint venture agreement on 15 November 2008 or any other date thereafter.

(9.10) On 24 December 2008, Wonderwonings demanded payment from Investec in terms of the third guarantee and Investec duly complied. Investec notified Slip Knot of the payment telephonically on 24 December 2008 and later confirmed same in writing.

(9.11) Blue Marine did not repay the amount of R2 830 000, 00, or any other amount, to Slip Knot.

(9.12) On 8 January 2009, Goldberg made a request on behalf of its client for time until the end of February 2009 to repay the deposit. On 9 January 2009, and in response to the said request, Slip Knot declined such request for an extension of time for repayment of the monies advanced without any security in place. Slip Knot demanded that payment be made of the capital plus interest immediately or that Goldberg be instructed to register the bond and that Forlee sign the acknowledgement of debt and suretyship as a matter of urgency.

(9.13) Blue Marine was unable to find a joint venture partner. Wonderwonings cancelled the sale agreement in a letter addressed by Bosman and Mostert dated 14 January 2009.

(9.14) No bond was subsequently registered and Forlee did not sign the acknowledgement of debt on behalf of Blue Marine neither did she sign a suretyship.

(9.15) Blue Marine was deregistered on 24 February 2011 as provided for in section 26 of the CC Act, in this regard, the Companies and Intellectual Property Commission (“CIPC”), previously the Companies and Intellectual Property Registration Office (CIPRO), addressed a notice to Blue Marine on 19 October 2010 in which it recorded its intention to deregister Blue Marine for failure to submit annual turns. Blue Marine did not respond to the said notice.

(9.16) On 24 February 2011 CIPC deregistered Blue Marine in terms of section 26(3) of the CC Act as is evident from its notice dated 24 February 2011 and the publication of the deregistration in its publication under publication no:20115, notice no: 25 dated 25 February 2011.

(9.17) On 24 February 2011, being the date of deregistration of Blue Marine, Blue Marine was indebted to Slip Knot in the amount of R2 830 000, 00 together with interest thereon.

(9.18) On 24 February 2011 being the date of deregistration of Blue Marine, Forlee was the sole member of Blue Marine.

(9.19) On 3 November 2011, Forlee applied for the restoration of Blue Marine registration. Blue Marine's registration was restored on 11 November 2011."

[3] The defendant's defence to the claim is founded on the provisions of s 11 (d) of the Prescription Act[2] in terms of which a debt becomes prescribed after a period of three years. She pleaded that: -

"10.2.1 The indebtedness of Blue Marine to the Plaintiff arose on or about 9 January 2009, when such debt became due and payable.

10.2.2 Such debt owing by Blue Marine to the Plaintiff became prescribed on or about 9 January 2009.

10.2.3 The Plaintiff sought to introduce a claim against the Defendant in terms of Section 26(5) of the Close Corporation Act, No, 69 of 1984 on 19 December 2013.

10.2.4 At that time Blue Marine's debt to the Plaintiff has become prescribed and the Defendant is consequently not indebted to the Plaintiff in the amount claimed, or at all, and neither was the Defendant so indebted as at 19 December 2013."

[4] It is not in issue that the defendant bears the onus of establishing her defence to this claim. In argument before me Mr Scott, readily conceded that case law emanating from this division was against him. He nonetheless submitted that the ratio, extrapolated

from Sage Wise 24 CC t/a Steel Doors and Frames v Vulcania Reinforcing Company (Pty) Limited v Cassim Chothia[3] and Zurcher's Electrical and Electronics CC v Kennedy[4] to the effect that deregistration triggered the personal liability of a member pursuant to the provisions of s 26(5) of the

Act, does not, ex facie both judgments, appear to be founded upon any cogent reasoning. He submitted that "upon a purposeful interpretation of the section such joint and several liability can only be for the balance of the period for which the close corporation would have had such liability".

[5] The submission is untenable. Sage and Zurcher did not, in any way establish new legal principle. Both followed precedent. In Mouton v Boland Bank Ltd[5]. Schutz J.A critically examined the provisions of s 26 and rejected the submission that restoration to the register extinguishes a liability imposed under s 26(5). The learned judge stated the following:

"[10] Turning then to the plain meaning of these subsections, the learned Judge was of the opinion that there was no basis for reading them otherwise than as meaning that s 26(7) does not extinguish a liability imposed under s 26(5). I agree. There is no provision in s 26(5) limiting its operation or making its operation subject to s 26(7). Nor is there any provision in s 26(7) to reverse the one-time operation of s 26(5) in respect of a member. On the contrary, the subsection is directed towards the state of the company. It may be, as the quotation from Sengol's case shows, that the relationship between the company, on the one hand, and its members, creditors and debtors, on the other, is affected. But this does not imply, even less necessarily imply, that the relationship between the corporation's creditor (in

this case the bank) and a co-debtor of the corporation (in this case Mouton) is affected. What the appellant is seeking to do is to read in words such as 'and the members referred to in ss (5) shall be deemed not to have incurred the liability therein referred' after the words in s 26(7) 'the corporation shall . . . be deemed to have continued in existence as from the date of deregistration as if it were not deregistered'. The appellant's argument also flouts the canon of construction that rights (in this case a right obtained under s 26(5)) are not lightly presumed to have been taken away by mere implication.

[11] Indeed, a contrary view would lead to consequences at least verging on the absurd. Take the cases where the member has already paid the corporation's debt; or where judgment has been taken against a member and his goods have been attached and sold in execution; or where, consequent upon a judgment against a member, a nulla bona return has been given, followed by his sequestration. In each of these cases, is the whole process to be thrown into reverse so that the debt should be brought home only to the now restored, but possibly plundered, corporation?

[12] Or take this very case. If Mouton is to succeed, are the proceedings legitimately taken by the bank to be set at nought? What is to happen to the costs? Are any amounts that Mouton may have paid to be returned? The Legislature has created a statutory fiction that a corporation never ceased to exist, when in fact it did. But I do not think that we should attribute to the Legislature a belief that it can actually recall time passed, for, as the poet has said:

'The Moving Finger writes; and, having writ,

Moves on: nor all thy Piety or Wit

Shall lure it back to cancel half a Line.'

[13] More prosaically, I agree with Bennion Statutory Interpretation 3rd ed sec 304 at 736, where the learned author says:

'The intention of a deeming provision, in laying down an hypothesis, is that the hypothesis shall be carried as far as necessary I to achieve the legislative purpose, but no further.'

[14] The broad purpose of s 26(7) is that a corporation which has been dissolved because of a misrepresentation by its members shall have its assets and liabilities restored to it, so that they may be applied to the ends ordained by law, whether in the course of continued carrying on of business, or in the course of liquidation. Nowhere is there any indication of a purpose to relieve from liability a member responsible for presenting creditors with a vacuum in place of a corporation. Accordingly there is no need to extend the bounds of an imaginary state of affairs, nor any justification for doing so.

[15] In short, the appeal should fail because s 26 contains no provision for Mouton's being relieved of personal liability, because no reason has been given why such a provision should be implied and because there are good reasons of policy why it should not be implied."

[6] In light of the foregoing, the “purposeful interpretation” contended for on behalf of the defendant is fanciful, self-serving and nothing more than an attempt by the defendant to extricate herself from her liability to pay the plaintiff that which is due. Prior to the date of deregistration of Blue Marine, the plaintiff had no claim against the defendant in terms of s 26(5). As adumbrated hereinbefore deregistration provided the catalyst for the claim. Consequently, the defence of prescription can clearly not avail the defendant.

[7] The second defence, that the defendant had no intention of binding himself personally is equally disingenuous. It is not in dispute that on 8 January 2009 the defendant’s attorneys sent an email to the plaintiff recording the following:

“1. Our client is negotiating with prominent persons and entities regarding a joint venture agreement, in light of the fact the Slipknot has not exercised its option;

2. The deposit paid by Slipknot will be refunded in full as soon as a commitment is made by the JV partner;
3. Our client acknowledges that Slipknot is vulnerable at this stage as a result of the fact that it holds no security for the deposit paid, and fully intends to refund the deposit as a matter of urgency;
4. In the premises, our client requests that you give her some time to refund the deposit, instead of incurring the expense of registering a surety bond;
5. The deposit has been invested in an interest-bearing trust account by Mostert & Bosman, interest accruing for Slipknot’s benefit, and the seller is not yet in position to pass transfer of the property;
6. Our client is in constant contact with Steven Sargeant from Wonderwonings and he is fully aware of what our client is doing, and has in fact also expressed an interest in entering into a joint venture with our client for the development of the property.”

[8] It will be gleaned from the content that the defendant’s attorneys made no differentiation between Blue Marine and the

defendant as regards the obligation to refund the money advanced. When a favourable response to the indulgence sought was not forthcoming, the defendant herself addressed an email to the plaintiff as follows:

“In reply to Riana’s question regarding the status quo. The sellers have been kind enough to give me a second chance with regards to finding the finance for the project.

I have pursued both avenues. That is; finding buyers for the plots and looking for an investment for the project.

Several answers are expected in the next two weeks with regards to both the plot sales and the persons interested in investing.

I have every intention of refunding your money as soon as possible and will be contacting you directly.”

[9] A plain reading of the aforementioned emails evinces an unconditional undertaking by the defendant personally to pay the plaintiff.

[10] In the result the following orders will issue:

1. The defendant is ordered to effect payment to the plaintiff in the sum of R2 830 000, 00.
2. The defendant is ordered to pay interest on the said sum of R2 830 000, 00 at the prime lending rate, as determined from time to time, plus 1% from 24 January 2011 to date of payment.
3. The defendant is ordered to pay the costs of suit, including the reserved costs.

D. CHETTY

JUDGE OF THE HIGH COURT

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[1] Act No, 69 of 1984 (now substituted)

[2] Act No 68 of 1969

[3] EC Case No: 1067/12 – An unreported judgment of Hartle J dated 26 June 2012

[4] 2012 JDR 0062 (ECP)

[5] 2001

(3) SA 877 (SCA)

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