

SOUTH AFRICA / JUDGMENT

Van Zyl NO and Another v Currin and Others (15047/2018) [2018] ZAWCHC 189 (15 October 2018)

[2018] ZAWCHC 189

COURT

Western Cape High Court, Cape Town

BEFORE

Vos

CASE / FILE NUMBER

15047/2018

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IN THE HIGH COURT OF
SOUTH AFRICA
(WESTERN
CAPE DIVISION, CAPE TOWN)

Case

No: 15047/2018

In

the matter between:

THOMAS
CHRISTOPHER
VAN ZYL
N.O.
First
Applicant
LEBOGANG
MICHAEL MOLOTO N.O.
Second
Applicant
and
WESLEY
AVIANT
CURRIN
First
Respondent
RICHARD
PAUL KRONK
Second
Respondent

MYLES
KRONK
Third
Respondent
CLOUD
CFO (PTY) LTD
Fourth
Respondent

JUDGMENT

DELIVERED ON 15 OCTOBER 2018

Vos, AJ

Introduction

[1] In this matter the applicants seek the following relief, based on the provisions of section 424 of the Companies Act, No. 61 of 1973:

[1.1] That the first to third respondents shall be personally liable, without any limitation of liability, jointly and severally, for all or any of the debts or other liabilities of Company Worx Group (Pty) Ltd (in liquidation) with registration number 2014/056263/07 (“Company Worx Group”).

[1.2] Alternatively, that the first to third respondents be personally liable, jointly and severally, for the debts of Company Worx Group in respect of Shaun Norman Currin (“Shaun Currin”).

[1.3] That the fourth respondent be liable for all or any of the debts or other liabilities of Company Worx Group, alternatively, that the fourth respondent be liable for the debts of Company Worx Group in respect of Shaun Currin.

[1.4] That the respondent or respondents opposing this application pay the costs of this application on an attorney and client scale.

[2] The parties are as follows:

[2.1] The first applicant is Thomas Christopher Van Zyl, an insolvency practitioner, and he acts in his capacity as the final liquidator of Company Worx Group;

[2.2] The second applicant is Lebogang Michael Moloto, and he is also an insolvency practitioner, and he acts in his capacity as the co-final liquidator of Company Worx Group;

[2.3] The first respondent is Wesley Aviant Currin, a chartered accountant, who was previously a director of Company Worx Group. I shall refer to the first respondent as “Wesley Currin”;

[2.4] The second respondent is Richard Paul Kronk, an adult male chartered accountant who is a director of Cloud CFO (Pty) Ltd. I shall refer to the second respondent as “Richard Kronk” and to Cloud CFO (Pty) Ltd as “Cloud CFO”;

[2.5] The third respondent is Myles Kronk who works at Cloud CFO, 55 Short Market Street, Cape Town. I shall refer to the third respondent as “Myles Kronk”. Myles Kronk is the father of Richard Kronk;

[2.6] The fourth respondent is Cloud CFO, a company which has been duly registered and incorporated under registration number 2016/051014/07. It has its registered office at 27 Oviston Way, Edgemoor, Cape Town, and its principal place of business is situated at 55 Short Market Street, Cape Town. Cloud CFO provides accounting services to the public.

Locus Standi

[3] The respondents contend that the applicants do not have locus standi in this matter, as the applicants failed to allege in the founding papers that they were invested with the requisite authority to commence these proceedings in terms of the provisions of section 386

(3) (a) and (4) (a) of the Companies Act, No. 61 of 1973.

[4] Section 386 of the Companies Act, 1973 deals with the powers of liquidators, and subsection (3) (a) provides that the liquidator of a company “in a winding-up by the Court, with the authority granted by meetings of creditors and members or contributories or on the directions of the Master given under section 387...” shall have the powers mentioned in subsection (4).

[5] In terms of section 386 (4) (a) the powers referred to in subsection

(3) are:

“... to bring or defend in the name and on behalf of the company any action or other legal proceeding of a civil nature ...”

[6] In the founding papers it has not been alleged that the applicants have instituted the proceedings with the authority of creditors and members, or on the “directions of the Master”. Therefore, the respondents submit that the applicants lack locus standi.

[7] After the respondents took the point that the applicants were not authorised to institute the present proceedings, they made written application to the Master for an extension of their powers in terms of section 386

(4) (a) (b) (c) of the Companies Act.[1] At the same time a copy of the application papers was submitted to the Master.

[8] On 9 October 2017 the Master advised the applicants[2] that their “extension of powers in terms of section 386 (4) (a) (b) and (c) is hereby granted”.

[9] A question that accordingly falls for determination, is whether the subsequent authorisation by the Master to the present proceedings,

validates the proceedings and grants the applicants the necessary locus standi. In the opposing papers the respondents have admitted

that the applicants are the final liquidators of Company Worx Group.

[10] In *Herbstein and Van Vincent*, the Civil Practice of Superior Courts of South Africa[3] the following is said:

*“It has been held that documentary proof of authorisation may be supplied in an answering affidavit. Where an application is made by an agent on behalf of a principal, an averment of the agent's authority is essential, unless it appears from affidavits filed in the application that the principal is aware of and ratifies the proceedings. A statement that the applicant is acting in the capacity of agent for the principal in question is a sufficient allegation of authority to make the application. The case of an artificial person, such as a company or co-operative society, differs from that of a natural person. As was pointed out in *Mall(Cape) (Pty) Ltd v Merino Ko-operasie Bpk*, since an artificial person, unlike an individual, can function only through its agents, and can take decisions only by the passing of resolutions in the manner prescribed by its constitution, it cannot be assumed, from the mere fact that proceedings have been brought in its name, that those proceedings have in fact been authorised by the artificial person concerned.”*

[11] Furthermore, a defect in apparent authority may be cured by retrospective authorisation. In *Nampak Products Ltd t/a Nampak Flexible Packaging v Sweetcor (Pty) Ltd*[4] the Court allowed ratification even though the person who signed the power was not authorised to do so at the time when the action was instituted.

[12] In *Fourways Mall (Pty) Ltd v SA Commercial Catering & Allied Workers Union*[5] the required allegations of due authorisation were in fact made in the founding affidavit, but were not substantiated by documentary

proof thereof. In the replying affidavit, such documentary proof of authorisation and/or ratification was supplied. The Court regarded

the case as being on all fours with the facts in *Moosa and Cassim NNO v Community Development Board*[6], in which the Supreme Court of Appeal approved such a procedure.

[13] In *Smith v Kwanonqubela Town Council*[7] an objection was taken to the authority of the person that brought the application on behalf of the Town Council. In his founding

affidavit, the deponent alleged that he had been duly authorised to act on behalf of the council by virtue of his appointment under

section 29A of the Black Local Authorities Act, 102 of 1982. In terms of that section, the then administrator of the Cape Province, could authorise any person to exercise, perform or fulfil the rights, powers and functions of a local authority if, due to the number of vacancies on the council, it was unable to act. The deponent's appointment in terms of section 29A, had expired on

31 May 1994. The proceedings were launched on 16 August 1994. The Town Council had subsequently been incorporated into the Alexandria Transitional Council, and the rights and duties of the Town Council devolved upon the transitional council. According to the minutes of a meeting held by the Transitional Council on 2 December 1994, the litigation against the appellant was discussed in full, and it was resolved that it be proceeded with.

[14] The Town Council alleged in a stated case before a High Court that it constituted sufficient authorisation of the deponent to represent the council. The Court concluded that the deponent to the founding affidavit had the necessary locus standi. On appeal to the Supreme

Court of Appeal, it was held[8] that the launch of legal proceedings was not an administrative act, but a procedural one open to any member of the public. Where a person (wrongly) believed that he had the necessary authority to act on behalf of a Town Council and his intention had been to act on behalf of the Town Council, and not on his own behalf, the general rule of agency, that such act of an “unauthorised agent” could be ratified with retrospective effect, applied.

[15] In *Lynn NO and Another v Coreejas*[9] the Supreme Court of Appeal held as follows:

“[12] Section 386(4)(a) empowers a liquidator to, inter alia, bring or defend legal proceedings on behalf of the company. The section requires a liquidator to be duly authorised by a meeting of creditors or members (s 386(3)) or by the Master in case of urgent legal proceedings for the recovery of outstanding accounts (s 386(4)) before he or she can bring such proceedings on behalf of the company. Our courts have held that if a liquidator litigates without the prescribed authority, the court may refuse to allow him his costs out of the company's assets and he may have to pay such costs himself. The litigation is not a nullity, it merely has potential adverse costs implications for the liquidator. And there is ample authority that a person against whom the unauthorised liquidator is litigating may not object to such lack of authorisation, for it is a matter between the liquidator and the creditors. Retrospective sanction of unauthorised litigation is available to the liquidator in appropriate instances, either from the creditors or members under s 386(3) or, if refused, from the Master under s 387(2) and, if the Master refuses, from the court under s 386(5) read with s 387(3).”

[16] In this matter, the applicants are similarly not acting in their personal capacity, but in their representative capacities as the joint liquidators of Company Worx Group. In my view, the Master ratified the litigation and by doing so, no substantive rights of the respondents were affected. They have also not shown any prejudice to them. A party to litigation, does not have the right to prevent the other party, from rectifying a procedural defect.

[17] In the premises, I am of the view that the applicants do have the necessary locus standi.

The legal principles: section 424 of the Companies Act, 1973

[18] The applicants base their claim against the respondents on section 424 of the Companies Act, 1973, which reads as follows:

“424. Liability of directors and others for fraudulent conduct of business:-

- (1) When it appears, whether it be in a winding-up, judicial management or otherwise, that any business of the company was or is being carried on recklessly or with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the Court may, on the application of the Master, the liquidator, the judicial manager, any creditor or member or contributory of the company, declare that any person who was knowingly a party to the carrying on of the business in the manner aforesaid, shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court may direct.
- (2)(a) Where the Court makes any such declaration, it may give such further directions as it thinks proper for the purpose of giving effect to the declaration, and in particular may make provision for making the liability of any such person under the declaration a charge on any debt or obligation due from the company to him, or on any mortgage or charge or any interest in any mortgage or charge on any assets of the company held by or vested in him or any company or person on his behalf or any person claiming as assignee from or through the person liable or any company or person acting on his behalf, and may from time to time make such further orders as may be necessary for the purpose of enforcing any charge imposed under this subsection.
- (b) For the purposes of this subsection, the expression "assignee" includes any person to whom or in whose favour, by the directions of the person liable, the debt, obligation, mortgage or charge was created, issued or transferred or the interest was created, but does not include an assignee for valuable consideration given in good faith and without notice of any of the matters on the ground of which the declaration is made.
- (3) Without prejudice to any other criminal liability incurred, where any business of a company is carried on recklessly or with such intent or for such purpose as is mentioned in subsection (1), every person who was knowingly a party to the carrying on of the business in the manner aforesaid, shall be guilty of an offence.
- (4) The provisions of this section shall have effect notwithstanding that the person concerned may be criminally liable in respect of the matters on the ground of which the declaration is made."

[19] In Henochsberg on the Companies Act 61 of 1973[10] the following is stated:

"Liability can be attached to any person, even if he is neither a member nor a director nor an officer of the company, and also a juristic person (Cooper NNO v SA Mutual Life Assurance Society [2000] ZASCA 153; 2001 (1) SA 967 (SCA)) so long as he is found to have been knowingly a party to the carrying on of the business recklessly etc. Persons with locus standi to bring s 424 proceedings may choose whom they wish to sue. In Fourie v Newton 2010 JDR 1437 (SCA) the liquidators proceeded against only one of the directors of a company in liquidation, not because his conduct was any different from the other directors, but (apparently) because he was the only director with liability insurance, and the Court held that there was nothing improper in such a course."

[20] Thus, the relief can be sought against any party who was knowingly a party to the carrying on of the business of the company in the manner specified in section 424(1).

[21] The onus is on an applicant to establish his case on a balance of probabilities[11]. However, where the applicant has no means to adduce evidence regarding the operations of the company, because the facts lie exclusively within the knowledge of the respondent, less evidence will suffice,

particularly where the respondent elects not to reveal the facts or to furnish any explanation of the evidence placed before the

Court[12].

[22] With regard to the “reckless” requirement of section 424, the following is stated in Henochsberg on the Companies Act 61 of 1973[13]:

“It is submitted, carrying on any business of the company recklessly means carrying it on by conduct which evinces a lack of any genuine concern for its prosperity (Anderson v Dickson NO (Intermedia Pty) Ltd intervening) 1985 (1) SA 93 (N) at 110; and cf L&P Plant Hire BK v Bosch 2002

(2) SA 662(SCA) at 677); Ebrahim v Airport Cold Storage (Pty) Ltd [2008] ZASCA 113; 2008 (6) SA 585 (SCA) at 18). See further Ex parte Lebowa Development Corporation Ltd 1989 (3) SA 71 (T) at 111; Heneways Freight Services (Pty) Ltd v Grogor 2007

(2) SA 561 (SCA); and Ozinsky NO v Lloyd 1992

(3) SA 396 (C) at 413–414. In this latter case Van Deventer J stated (at 414): “If a company continues to carry on business and to incur debts when, in the opinion of reasonable businessmen, standing in the shoes of the directors, there would be no reasonable prospect of the creditors receiving payment when due, it will in general be a proper inference that the business is being carried on recklessly. ...”

[23] With regard to the “intention to defraud” and “fraudulent purpose” requirements of section 424 (1), Henochsberg on the Companies Act 61 of 1973 state the following[14]:

“It is submitted that the intention is that the section is to apply irrespective of the nature of the conduct provided in the light of it there was, or is, a carrying on of the business of the company with intent to defraud any creditor of the company or anyone else’s creditor or a carrying on of the business for any fraudulent purpose, i.e. even if that purpose does not involve the defrauding of any particular creditor, ...”

“It is not the case that, merely because the company makes a disposition of its property which constitutes the giving of a voidable or an undue preference, the business of the company has been carried on with intent to defraud its other creditors or for a fraudulent

purpose (Simon case supra at 525–526): an intention to prefer is not per se equivalent to an intention to defraud ... However, a preference may be given in circumstances where the giving of it would involve a fraud on other creditors ...”

[24] Blackman in Commentary on the Companies Act[15] says the following: “The words ‘defraud’ and ‘fraudulent purpose’ connote actual dishonesty involving, according to current notions of fair trading among commercial men, real moral blame.”

[25] A person (in the wide sense) is knowingly a party to the carrying on of the business if there is proof “on a balance of probabilities, that the person sought to be held liable had knowledge of the facts from which the conclusion is properly to be drawn that the business of the company was or is being carried on. It would not be necessary to go further and prove that the person also had actual knowledge of the legal consequences of those facts”[16].

[26] In respect of a director of the company the position is more onerous. Goldstone JA said the following in Howard v Herrigel [17]

“A director has an affirmative duty to safeguard and protect the affairs of the company. In my opinion, it follows that ... [a director] may well be a ‘party’ to the reckless or fraudulent conduct of the company’s business even in the absence of some positive steps by him in the carrying on of the company’s

business. His supine attitude may, I suppose, even amount to concurrence in that conduct. Whether such an inference could properly

be drawn will depend upon the facts and circumstances of the particular case.”

[27] In Ebrahim and Another v Airport Cold Storage (Pty) Ltd[18] the Supreme Court of Appeal considered the application of section 64

(1) of the Close Corporations Act, 69 of 1984 when the appellants (a father and son), were held personally liable for a payment of a debt due by a close corporation. Section 64 of the Close Corporations Act reads as follows:

“64. Liability for reckless or fraudulent carrying-on of business of corporation

(1) If it at any time appears that any business of a corporation was or is being carried on recklessly, with gross negligence or with

intent to defraud any person or for any fraudulent purpose, a Court may on the application of the Master, or any creditor, member or liquidator of the corporation, declare that any person who was knowingly a party to the carrying on of the business in any such

manner, shall be personally liable for all or any of such debts or other liabilities of the corporation as the Court may direct, and the Court may give such further orders as it considers proper for the purpose of giving effect to the declaration and enforcing that liability.

(2) If any business of a corporation is carried on in any manner contemplated in subsection (1), every person who is knowingly a party

to the carrying on of the business in any such manner, shall be guilty of an offence.”

[28] The Supreme Court of Appeal held that the close corporations’ business “... appears to have been conducted with blithe disregard of statutory requirements. There were no conventional books of account”[19].

[29] In Ebrahim the Court further dealt with the notion of reckless conduct:

“[13] On this foundation, the plaintiff contended it had established that the business of the CC was 'carried on recklessly' within the meaning of s 64 of the Act, and indeed that it had made out a case of fraudulent trading. Section 64 is for all intents and purposes identical to s 424 of the Companies Act 61 of 1973, 'at least as far as the underlying philosophy is concerned'. The case law on one provision therefore illuminates the other. The Act adds 'gross negligence' to the Companies Act's list of impugned business methods. Whether there is a meaningful difference between recklessness and gross negligence in this context need not be decided now.

[14] Acting 'recklessly' consists in 'an entire failure to give consideration to the consequences of one's actions, in other words, an attitude of reckless disregard of such consequences'. In applying the recklessness test to the running of a closed corporation, the court should have regard to amongst other things the corporation's scope of operations, the members' roles, functions and powers, the amount of the debts, the extent of the financial difficulties and the prospects of recovery, plus the particular circumstances of the claim 'and the extent to which the [member] has departed from the standards of a reasonable man in regard thereto'.

[15] It need hardly be added that the function of the statutory provision also shapes its application. Although juristic persons are recognised by the Bill of Rights - they may be bound by its provisions, and may even receive its benefits - it is an apposite truism that close corporations and companies are imbued with identity only by virtue of statute. In this sense their separate existence remains a figment of law, liable to be curtailed or withdrawn when the objects of their creation are abused or thwarted. 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 corporation's affairs exceeds the merely inept or incompetent and becomes heedlessly gross or dishonest. The provision in effect exacts a quid pro quo: for the benefit of immunity from liability for its debts, those running the corporation may not use its formal identity to incur obligations recklessly, grossly negligently or fraudulently. If they do, they risk being made personally liable.”

[30] I am also mindful that courts will not lightly disregard a corporation’s separate entity[20], and more likely find that recklessness did not exist[21]. The provisions of section 424 of the Companies Act have as objective, that the application thereof is both compensatory[22] and punitive[23], and “play an important role in reminding those who run corporations, and those knowingly party to their business methods, that the shadow of personal liability can fall across their dealings”. [24]

[31] In *Tsung and Another v Industrial Development Corporation of South Africa Ltd and Another*[25] the respondents instituted an action to recover their investment in the sum of R 35 000 000.00 against the appellants in terms of the provisions of section 424 of the Companies Act, on the basis that the business had been carried on recklessly or with the intention to defraud creditors. The High Court found for the respondents, declaring that the appellants' conduct fell within the ambit of section 424, and that they were personally liable. On appeal it was contended by the appellants that some causal link between their acts and the inability of the company to pay its debts, was necessary in order to found liability under section 424, and that there had been no deliberate or reckless wrongdoing in the conduct of the business.

[32] The Supreme Court of Appeal held that the carrying on of the business of a company recklessly, meant carrying it on by conduct which evinced a lack of any genuine concern for its prosperity. It also laid down the general principle that section 424 did not require proof of a causal link between the relevant conduct and the company's inability to pay the debt. It also said:

"A fortiori if one deliberately depletes the company's assets, or misuses its corporate form for one's own purposes, then that conduct will fall within the ambit of s 424"[26]

[33] I now turn to consider some of the general duties that are cast upon employees and directors of companies. In *Robinson v Randfontein Estates Goldmining Co Ltd*[27], part of the headnote reads as follows:

"Where one man stands to another in a position of confidence involving a duty to protect the interest of that other, he is not permitted to make a secret profit at the other's expense or to place himself in a position where his interest conflicts with his duty"

[34] In *Phillips v Fieldstone Africa (Pty) Ltd and Another*[28] the law relating to the breach of a fiduciary duty and its consequences, was set out and explained. The Supreme Court of Appeal held that the position of an employee is to be approached in the same manner as any other supposed fiduciary. The basic principle was stated that a person in a position of confidence involving a duty to protect the interest of another, is not entitled to make a secret profit at the other's expense nor place himself in a position where his interest conflicts with such duty. The appellant submitted that he was a mere employee and should not be burdened with the strict and extensive application of the doctrine of the fiduciary duty that a director owes to a company.

[35] It was held[29] that:

"There is no magic in the term 'fiduciary duty'. The existence of such a duty and its nature and extent are questions of fact to be adduced from a thorough consideration of the substance of the relationship and any relevant circumstances which affect the operation of that relationship"

[36] The Court stated that the fundamental question was “not whether the appellant appropriated an opportunity belonging to the respondents, but whether he stood in a fiduciary relationship to them when the opportunity became available to him: if he did, it ‘belonged to the respondents.’” The Court held that on the facts, the appellant stood in a position of trust in relation to the business of the respondents and he had the duty to promote the interests of the respondents. It further said[30]:

“That the appellant breached his duty is manifest. He failed to inform the respondents of the offer to him or its terms; he took it for himself without their consent. In both respects he succumbed to a potential conflict of interest between his duty and his self-interest.”

[37] Fairness and honesty are also important values in business. In Stellenbosch Wine Trust Ltd v Oude Meester Group Ltd, Oude Meester Group v Stellenbosch Wine Trust Ltd[31] Diemont J expressed himself as follows:

“It must be conceded that these phrases, fairness in competition and honesty in trade, have an old-fashioned ring about them which may cause the cynic in business to smile, but it is right that the Courts should have regard to and emphasise these virtues. Moreover the phrases are somewhat elastic, as difficult to apply in some cases as the concept of the reasonable man is difficult to apply. Nevertheless, if our law is to develop and is to offer the commercial man protection from unlawful interference in his business, the Courts will not disregard the words fairness and honesty.”

[38] More than a century ago an employee’s duty to his employer was described as follows in Rob v Green[32]:

“... In the absence of any stipulation to the contrary, there is involved in every contract of service an implied obligation, call it by what name you will, on a servant that he shall perform his duty, especially in these essential respects, namely that he shall honestly and faithfully serve his master; that he shall not abuse his confidence in matters appertaining to his service, and that he shall, by all reasonable means in his power, protect his master’s interest in respect to matters confided to him in the course of his service.”

[39] Against the backdrop of the above legal principles, I now turn to consider the relevant facts.

Background

facts

[40] The applicants allege that the respondents have all been party to the carrying on of the business of Company Worx Group in a reckless manner with the intention of defrauding the creditors of Company Worx Group. The further contention is that Wesley Currin, Richard Kronk and Myles Kronk caused the business and assets of Company Worx Group to be transferred to Cloud CFO, in order to frustrate claims against Company Worx Group, and in particular a claim of R 4 687 521.00 which is owed by Company Worx Group to the insolvent estate of Shaun Currin.

- [41] Shaun Currin was an employee of ORO Africa (Pty) Ltd (“ORO Africa”). He left the employment of ORO Africa after
- allegations of fraud, and was sequestered on the basis of an alleged loan in terms of which ORO Africa advanced him money.
- [42] Company Worx Group was registered on 18 March 2014. At that date Shaun Currin was its only director. It operated in Cape Town, while providing accounting services to its clients. Shaun Currin resigned as director on 1 June 2015.
- [43] Wesley Currin is the brother of Shaun Currin, and on 1 June 2015 he became a director of Company Worx Group. That was the same day on which Shaun Currin resigned. Wesley Currin has no accounting or tertiary education qualifications.
- [44] Richard Kronk is a friend of Shaun Currin and Wesley Currin. He started working for Company Worx Group in November 2014, and he held the position of general manager. He continued working for Company Worx Group until May 2016. However, on 9 February 2016 Richard Kronk registered Cloud CFO.
- [45] Myles Kronk is the father of Richard Kronk and he is employed at Cloud CFO.
- [46] Cloud CFO is a company which operates at the same premises as Company Worx Group, and it provides the same accounting services to its clients, as the accounting services that Company Worx Group offered. Richard Kronk is the only director of Cloud CFO.
- [47] Company Worx Group was established by Shaun Currin and he described himself as the “entrepreneurial founder” thereof. Company Worx Group was a holding company and had 3 subsidiaries being Company Worx Accounting (Pty) Ltd, Company Worx Online (Pty) Ltd and Company Worx Statutory (Pty) Ltd.
- [48] Shaun Currin was the chief financial officer of ORO Africa and stopped working there in June 2015. On 15 July 2015 Shaun Currin was provisionally sequestered.
- [49] Shaun Currin opposed the sequestration application on the return day. In his papers he alleged that he was not insolvent, and he had lent an amount of R 4 687 521.00 to Company Worx Group. Therefore, Company Worx Group owed him that money. Wesley Currin produced a loan certificate evidencing that the amount of R 4 687 521.00 was payable by Company Worx Group to Shaun Currin.
- [50] Shaun Currin also produced a written loan agreement between himself and Company Worx Group which sets out the terms of the loan. In essence, he granted a loan facility of R 5 000 000.00 to Company Worx Group, and that loan would not be demanded prior to 1 March 2017. The loan also involved the sale of certain intellectual property by Shaun Currin to Company Worx Group for the amount of R 3 500 000.00.

- [51] Richard Kronk deposed to an affidavit in the sequestration application, in which he stated that Shaun Currin had given intellectual property to Company Worx Group and the “online strategy” of Company Worx Group was valuable, and could generate income from which the loan could be repaid.
- [52] On 17 December 2015 Shaun Currin was finally sequestered by order of the Western Cape High Court.
- [53] When Cloud CFO was registered on 9 February 2016, and Richard Kronk became its sole director, Richard Kronk was still the general manager of Company Worx Group. He continued working at Company Worx Group until about May 2016.
- [54] On 28 February 2017 Company Worx Group was provisionally liquidated and on 28 April 2017 the order was made final. The liquidation order was obtained at the instance of the trustees of the insolvent estate of Shaun Currin, and on the basis that Company Worx Group was indebted to Shaun Currin, and had ceased trading.
- [55] Shaun Currin, Wesley Currin, Richard Kronk and Myles Kronk gave evidence at insolvency hearings. However, only the record of the evidence given by Wesley Currin and Richard Kronk, has been introduced in this application.
- [56] It is common cause that Company Worx Group owes R4 687 521.00 to the insolvent estate of Shaun Currin. That is the only liability.[33]

The defences

[57] The respondents have raised the following defences to the applicants’ claim:

[57.1] Mr Gary Nathan, who deposed to the main founding affidavit, does not have locus standi. There is no merit in this point, as Mr Nathan does not have to be authorised to produce evidence.

[57.2] The application is an abuse of process.

[57.3] The applicants have failed to show that the business of Company Worx Group was carried on recklessly or for any fraudulent purpose, and the applicants have also failed to show that anybody was knowingly a party to such conduct.

[57.4] In his answering affidavit, Richard Kronk stated that “...I also rely on the records of the insolvency inquiries that were held and at which the first and third respondents and me testified.” Short confirmatory affidavits were filed by Wesley Currin and Myles Kronk in which they inter alia confirmed the affidavit of Richard Kronk. The respondents further contend that the evidence produced at the insolvency inquiries, is only admissible against the specific respondent who testified at the hearing, and not against other respondents.

[57.5] Section 65 (5) of the Insolvency Act, 24 of 1936 provides that:

“Any evidence given under this section shall, subject to the provisions of subsection (2A), be admissible in any proceedings instituted against the person who gave that evidence.”

[57.6] In Insolvency Law[34] the following is stated with regard to Section 65(5):

“The evidence which the witness gives is admissible in any subsequent civil proceedings or criminal proceedings for perjury, etc against him (but no other criminal proceedings); it does not however constitute proof of the facts revealed by such evidence. Such

evidence is not admissible against anyone else. In the proceedings in which it is sought to be used, the evidence must be

regarded as a whole, ie, including any portions of it favourable to the witness. But the weight, if any, to be attached to such portions must be determined by the Court in the light of a number of factors. These will include the probabilities, the extent to which and the manner in which the deponent was cross-examined, and his credibility, as far as it can be judged from the written record of what he said. Regard will be had to the motives which are likely to have operated on the deponent's mind at the time when he made the statement, and to the other relevant evidence in the trial at which the statement was produced”.

[58] Where there are disputes of fact, I am obliged to apply the well-known test laid down in Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd[35]:

“It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact (see in this regard Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T) at 1163 - 5; Da Mata v Otto NO 1972 (3) SA 858. (A) at 882D - H). If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6 (5) (g) of the Uniform Rules of Court (cf Petersen v Cuthbert & Co Ltd 1945 AD 420 at 428; Room Hire case supra at

¹¹⁶⁴⁾ and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks (see eg Rikhoto v East Rand Administration Board and Another 1983 (4) SA 278 (W) at 283E - H). Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers”

The applicants' claim against Wesley Currin and an evaluation of the evidence given by him at the insolvency inquiry

[59] On 1 June 2017 Wesley Currin gave evidence at the interrogation of Shaun Currin. He confirmed that he had no tertiary or accounting

qualification. He was always the only shareholder of Company Worx Group and on 18 March 2014 he became its director.

[60] No financial statements were drawn up by or on behalf of Company Worx Group since its inception and there were no audited financial

statements. Section 30 of the Companies Act, 71 of 2008 provides as follows:

“30. Annual financial statements

(1) Each year, a company must prepare annual financial statements within six months after the end of its financial year, or such shorter period as may be appropriate to provide the required notice of an annual general meeting in terms of section 61 (7).”

[61] There should be no doubt that the financial statements of a company are vitally important to everyone with an interest in that company[36]. As its only director, Wesley Currin had the obligation to ensure that financial statements were produced. He failed in that duty.

[62] In a letter dated 5 June 2017, Wesley Currin informed the first applicant inter alia as follows:

“I have stated to you very clearly there is no bank account for Company Worx Group (Pty) Ltd.”[37]

[63] It is strange that Wesley Currin did not ensure that Company Worx Group had its own bank account into which its income was deposited.

[64] Company Worx Group moved from the 7th floor of 55 Short Market Street, to the 2nd floor of the same building as it required more space. Cloud CFO started operating from those same premises, being the 2nd floor of 55 Short Market Street.

[65] Almost all the staff of Company Worx Group were taken over by Cloud CFO. That included Wesley Currin, as he started consulting at Cloud CFO.

[66] Cloud CFO offers the same services which Company Worx Group offered to those clients.

[67] The website of Cloud CFO is similar to the website of Company Worx Group.

[68] The telephone number of Company Worx Group was taken over by Cloud CFO. Wesley Currin stated that there was nothing that he could do about Richard Kronk leaving Company Worx Group and taking the business model, intellectual property and phone number of Company Worx Group.

[69] Company Worx Group had previously bought a business from Growth Accountants CC for R 3 500 000.00. Wesley Currin confirmed that he was “... the one in charge of Company Worx Group (Pty) Ltd...”[38].

[70] With regard to Cloud CFO taking the telephone number of Company Worx Group over, Wesley Currin justified it as follows: “Also it was in my best interest because I was going to consult for him”[39].

[71] The marketing brochure of Company Worx Group reads as follows:

“Company Worx offers a monthly Accounting and Tax Service; which provides a professional accounting support team to process your books, submit your taxes and report on your business finances. This service includes being assisted with the responsibility to declare taxes to SARS. We use the latest cloud-based accounting software; allowing you to access, or upload your accounting and financial information from anywhere with an internet connection.

This accounting software is included in your monthly price. Besides cloud-based access and storage, other neat features include allowing you to snap a photo of invoices or slips and automatically upload these to the cloud. All your documents are stored online and your business accountant receives, processes and updates your business expenses the next morning or in real time.”

[72] The Cloud CFO brochure reads as follows:

“Cloud CFO offers a monthly Accounting and Tax Service; which provides a professional accounting support team to process your books, submit your taxes and report on your business finances. This service includes being assisted with the responsibility to declare taxes to SARS. We use the latest cloud-based accounting software; allowing you to access, or upload your accounting and financial information from anywhere with an internet connection.

This accounting software is included in your monthly price. Besides cloud-based access and storage, other neat features include allowing you to snap a photo of invoices or slips and automatically upload these to the cloud. All your documents are stored online and your business accountant receives, processes and expressly updates your business expenses within 3 working days – moving you closer to Real Time financial reporting on your business.”

[73] It is clear that the two brochures are virtually identical.

[74] At all relevant times Wesley Currin was the only director of Company Worx Group. He therefore stood in a fiduciary position and had to promote its interests. That duty included the obligation to reasonably preserve and protect its assets. The assets included the telephone number of the business, intellectual property, the business model and the clients. The clients are very important, because they were the source of income for Company Worx Group. Now, it cannot be said that Company Worx Group owned those clients, or that the clients were not permitted to take their business elsewhere. It is common cause that virtually all the clients migrated from Company Works Group to Cloud CFO. The manner in which it occurred, is important.

[75] Wesley Currin knowingly permitted the telephone number of Company Works Group to be transferred to Cloud CFO. At the very least, he did nothing to prevent it. The telephone number is very valuable, because it connects the clients with a business. He therefore knew that he was involved in a scheme to divert clients from Company Worx Group to Cloud CFO. It was also in his best interests to divert the clients to Cloud CFO, because he was going to work there, and no longer work at Company Worx Group. That conduct was reckless,

because it stripped Company Worx Group of its assets and income base. With the income stream gone, there was no money to pay creditors.

[76] With regard to Wesley Currin's active involvement in the transfer of the business from Company Worx Group to Cloud CFO, his evidence was illuminating[40]:

"Yes, I mean obviously there is a big handover... you know there is a starting to get Telkom lines all of that it all takes time." (sic)

[77] The "big handover" can only mean, properly construed, that Wesley Currin had actual knowledge of the handover of the business from Company Worx Group to Cloud CFO.

[78] His conduct fell short of the statutory obligations imposed upon directors by section 76 of the Companies Act[41]. Subsection (3) provides as follows:

"(3) Subject to subsections (4) and (5), a director of a company, when acting in that capacity, must exercise the powers and perform the functions of director-

- (a) in good faith and for a proper purpose;
- (b) in the best interests of the company; and
- (c) with the degree of care, skill and diligence that may reasonably be expected of a person-
- (i) carrying out the same functions in relation to the company as those carried out by that director; and
- (ii) having the general knowledge, skill and experience of that director."

[79] In my view Wesley Currin failed to act "in good faith" and "in the best interests of the company", as meant in section 76 of the Companies Act, 2008.

[80] In the premises, I am satisfied that Wesley Currin was actively involved in reckless conduct on behalf of Company Worx Group, and he had actual knowledge of that wrongful conduct.

The applicants' claim against Richard Kronk and an evaluation of the evidence given by him at the insolvency enquiry

[81] Richard Kronk testified that he worked for Company Worx Group as general manager from November 2014, to about May 2016. He therefore had the duty to promote and protect the accounting business of Company Worx Group during that time. He also did not have the right, while so employed, to compete with the interests of Company Worx Group.

[82] On 9 February 2016, Richard Kronk registered Cloud CFO and started to render accounting services to the clients of Cloud CFO. By providing those accounting services, while still working as general manager at Company Worx Group, he was in direct competition

with Company Worx Group. That conduct was in my view reckless, because he must have foreseen that his conduct would lure customers

and potential customers away from Company Worx Group. When those customers were lured away, so too would the income be diverted away from Company Worx Group to Cloud CFO.

[83] But even before 9 February 2016, and while he was still general manager at Company Worx Group, Richard Kronk was doing "...side work using the name Cloud CFO..."[42] The period during which Richard Kronk was thus in direct competition with Company Worx Group, was probably in excess of three months. By going into competition with his employer, Richard Kronk succumbed to a conflict of interest between his duty to his employer, and his self-interest.

[84] In his effort to successfully compete with his employer, Company Worx Group, he also took the one telephone number of Company Worx Group over. That must have been beneficial to Richard Kronk and to Cloud CFO, because when clients telephoned Company Worx Group, they would automatically have been diverted to Cloud CFO. By taking the telephone number over, Richard Kronk acted recklessly. He

had little regard for its prosperity.

[85] He must have foreseen that clients and potential clients of Company Worx Group, who would telephone Company Worx Group, would automatically be diverted to Cloud CFO. Once the clients have been diverted to Cloud CFO, the income stream would also have been diverted away from Company Worx Group to Cloud CFO. In such manner, Richard Kronk would have succeeded in building his business in competition with his employer.

[86] The startling manner in which Richard Kronk rationalises that it is perfectly in order to take a telephone number away from an employer,

is illustrated by the following evidence:[43]

"Mr van Reenen: If we take the example that you have been developing is if I am an attorney and leave my attorneys' firm to start my own little thing on the side as you did. I don't really take the number of my old firm with me?"

Richard Kronk: Why wouldn't you?

Mr van Reenen: Because they would like to keep their clients and don't give them to me.

Richard Kronk: That is their problem and not mine."

[87] With regard to taking the telephone number of the Company Worx Group away from it, Richard Kronk rationalised that it is of no significance:

"...In terms of the telephone number to me it is the smallest thing..."[44]

[88] I disagree. A telephone number of a business is usually its lifeblood. But Richard Kronk did not only take the telephone number

over. He also took over other assets:

“... Look we took over rental we took over a couple of different things” [45]

[89] Richard Kronk conceded that the website brochures of Company Worx Group and Cloud CFO are very “similar”. In producing his own website brochure, he basically copied the one of Company Worx Group. Now, it may possibly be argued that Company Worx Group had no statutory or other protection over their website brochure.

[90] However, that is not the issue. The question is whether Richard Kronk had the right, while standing in a fiduciary duty to Company Worx Group, to take the contents of the Company Worx Group brochure, and create his own brochure by essentially copying it for the benefit of himself and Cloud CFO. While doing that, he was competing with his own employer. In my view that conduct falls short of the fiduciary duty cast upon a general manager to protect the assets and business of his employer, and not to use the intellectual property of his employer in order to compete with his employer, after utilising such intellectual property (the website brochure).

[91] In Employment Law[46] the following is said:

“Unless otherwise agreed, the employee must do nothing to injure the employer’s proprietary rights and interest. He must respect the goods and chattels of the employer, stock and trade, tools and machinery, and land, buildings and other assets. To misappropriate

the things intrusted to him or to which he has access is both a breach of contract and a delict for which the employee can be held

liable. He is equally liable whether he takes elicited possession of the goods, improperly converts them to his own use, or unjustifiably

give them to another. That he was responsible for producing the goods will be immaterial if he produces them in the course of his

employment with the employer”.[47]

[92] When Richard Kronk was questioned about whether he could lawfully have appropriated the intellectual property of Company Worx Group, he justified his conduct by saying:

“...As long as the owners of that business don’t mind and they didn’t mind ...” [48]

[93] I turn to deal with the evidence regarding the “Business Start-up Packages”. It was put to Richard Kronk that the Business Start-up Packages of Company Worx Group and Cloud CFO are “precisely the same”. The Business Start-up Packages are identified as the “Spark Package”, the “Launch Package”, the “Existence Package”, the “Survival Package”, the “Success Package” and the “Freedom Package”.

[94] Richard Kronk conceded that the Business Start-up Packages of both Company Worx Group and Cloud CFO are identical, but rationalised that he was allowed to use those packages for Cloud CFO “because I came up with those names”[49]. The test is not whether Richard Kronk came up with the names while he was working at Company Worx Group, but whether he

was permitted, as employee, to take that intellectual property and use it in direct competition with his own employer. I do not think that the law can countenance such conduct.

- [95] The applicants have contended in the founding papers that the costs of starting Cloud CFO were minimal and that the setup of Company Worx Group "... was simply transferred over to Cloud CFO"[50]. Those allegations were not denied[51].
- [96] In the premises, I am satisfied that Richard Kronk was also actively involved in the reckless conduct on behalf of Company Worx Group, and he had actual knowledge of that wrongful conduct.

The claim against Myles Kronk

- [97] The applicants allege that Myles Kronk was employed by Company Worx Group, but that is denied by him[52]. As these are motion proceedings, I am bound to apply the Plascon Evans principle. There is no reason to reject the version of Myles Kronk.
- [98] Further, no evidence has been produced to satisfy the requirements of section 424 of the Companies Act, 1973 to find that Myles Kronk was knowingly a party to reckless or fraudulent conduct on behalf of Company Worx Group.

The claim against Cloud CFO

- [99] In paragraph 83 of the founding affidavit, it is alleged against Cloud CFO as follows:

"The fourth respondent (represented by the second respondent) was clearly aware that the source of its clients and assets was the Company and the manner in which the business was transferred was improper and without any reason, other than to strip the Company of assets. The fourth respondent was a party to that scheme and also benefitted from it".

- [100] The foregoing contentions regarding the alleged unlawful conduct of Cloud CFO, were specifically denied[53].
- [101] In this application the applicants introduced the record of the evidence given by Richard Kronk at the insolvency enquiry, in order to hold Richard Kronk and Cloud CFO liable. The evidence that Richard Kronk gave at the insolvency enquiry, is admissible against him personally in these proceedings. For the reasons that follow, I am of the view that the evidence of Richard Kronk, is not admissible against Cloud CFO.
- [102] Section 65 (5) of the Insolvency Act, No. 24 of 1936 provides that the evidence which is given, is admissible against the person who gave that evidence.
- [103] In *Rhodesian Corporation Ltd v Globe and Phoenix Gold Mining Cole Ltd*[54] the following was held:

“It is difficult to see in principle why a distinction should be made in the case where a person calls his agent as a witness or a corporation calls its officer to testify on its behalf. The witness who enters the witness-box swears to speak the truth and is not there to represent his principal. The giving of evidence by an officer of a corporation is not an act done in the course of his employment. When once he is in the witness-box the company has no control over him. What he states in the witness-box may bind the company in that particular suit, but his evidence cannot be treated by a stranger as an admission binding on the company. No doubt in most cases the principal knows more or less on what lines the witness will give his evidence, but the witness may give his testimony in direct opposition to the interests of his principal. The fact that he speaks about matters entrusted to him by his principal who calls him, cannot alter the fact that in the witness-box the witness represents no one but himself, though he states what he knows of his own knowledge acquired whilst he was an agent. It is always difficult to foresee all cases which may arise and therefore it may be possible that in certain special circumstances the Court may conclude that a witness was authorised to make a particular statement in the witness-box on behalf of his principal, but to hold simpliciter that statements in evidence made by an agent called by his principal in a suit to which the latter is a party will bind the principal as a party in a later action by a stranger is not only a violation of the general principle that the oral statements of a witness called by a party cannot be used by a stranger against such party in a subsequent trial but it may lead to the gravest injustice.”

[104] In *O’Shea NO v Van Zyl and others NNO*[55] the Supreme Court of Appeal held that statements made by a trustee of a trust before a Commissioner at an enquiry in terms of section 417 of the Companies Act, 1973, was inadmissible against the trust in later sequestration proceedings in the absence of their confirmation

under oath by the trustee in those proceedings.[56]

[105] In applying the above principles to the claim made by the applicants against Cloud CFO, it follows that the evidence that Richard Kronk gave at the insolvency enquiry, is inadmissible against Cloud CFO. The same principle would apply in respect of the evidence of Wesley Currin. To the extent that the applicants have made claims of wrongful conduct in the founding papers, same have been denied. In applying the *Plascon Evans* principle, I have to accept the version of Cloud CFO.

[106] It therefore follows that the applicants have failed to prove their case against Cloud CFO.

Costs

[107] On 28 November 2017 Andrews, J granted an order in terms of which the costs pertaining to the applicants’ application to compel the respondents to deliver answering papers, and the respondents’ application to compel compliance with rule 35

(3) notices, stood over for later determination. It is accordingly necessary to deal with those costs.

- [108] On 21 November 2017 the applicants launched an application to compel the respondents to deliver answering affidavits. That was met by an application on 24 November 2017, to compel the applicants to comply with a rule 35 (12) notice of the respondents. The respondents took up the attitude that they could not deliver answering affidavits, prior to the documents that they required in term of rule 35 (12), were produced.
- [109] After the documents were produced by the applicants, the respondents filed their opposing papers on 15 December 2017.
- [110] In my view the application to compel the respondents to deliver answering affidavits, before the applicants had complied with the rule 35(12) notice, was premature. In the circumstances I am of the view that the applicants are not entitled to the costs of the application to compel the respondents to deliver answering affidavits.
- [111] I am of the view that the respondents were entitled to launch their application on 24 November 2017, to compel the applicants to reply to their rule 35 (12) notice. They are therefore entitled to the costs.

Order

[112] In the premises I make the following order:

1. It is declared in terms of section 424 (1) of the Companies Act No. 61 of 1973 that Wesley Aviant Currin and Richard Paul Kronk are, jointly and severally, personally liable for the debt of R 4 687 521,00 which is owed by Company Worx Group Pty Ltd (in liquidation) to the insolvent estate of Shaun Norman Currin (reference C442/2015)
2. The application against Myles Kronk and Cloud CFO (Pty) Ltd is dismissed.
3. Insofar as costs are concerned:
 - 3.1 Wesley Aviant Currin and Richard Paul Kronk are ordered, jointly and severally, to pay the costs of this application, including the costs occasioned on 25 June 2018.
 - 3.2 The applicants are ordered to pay the costs of Myles Kronk and Cloud CFO (Pty) Ltd.
 - 3.3 The applicants are ordered to pay the costs of the respondents involving the application to compel the delivery of answering affidavits (dated 21 November 2017), and the application to compel the applicants to comply with the respondents' discovery notices (dated 24 November 2017).

W. VOS, AJ

ACTING JUDGE OF THE HIGH COURT

[1] The date of the letter to the Master is eligible

[2] Represented by Mazars

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- [3] 3rd ed at page 437
- [4] 1981 (4) 919 T
- [5] 1999 (3) SA 752 (W)
- [6] 1990 (3) SA 175 (A)
- [7] 1999 (4) SA 947 (SCA)
- [8] At paragraph [10]
- [9] 2011(6) SA 507(SCA at Para [12]
- [10] At page 912
- [11] Joh-Air (Pty) Ltd v Rudman 1980
- (2) SA 420 (T) at 426 427; Philotex (Pty) Ltd v Snyman [1997] ZASCA 92; 1998
- (2) SA 138 (SCA) at 142
- [12] Strut Ahead Natal (Pty) Ltd v Burns 2007
- (4) SA 600 (D) at 608
- [13] At page 916
- [14] At page 916 (1)
- [15] Juta at 14-538-1
- [16] Howard v Herrigel NO [1991] ZASCA 7; 1991 (2) SA 660 (A) at 673–674; Ebrahim v Airport Cold Storage (Pty) Ltd [2008] ZASCA 113; 2008
- (6) SA 585 (SCA) at paras 23–24
- [17] 2008 (6) SA 585
- [18] at 674
- [19] At paragraph [10]
- [20] Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd and Others [1995] ZASCA 53; 1995 (4) SA 790 (A) at 803 H
- [21] Philotex (Pty) Ltd v Snyman [1997] ZASCA 92; 1998 (2) SA 138 (SCA) at 142 H – I and 143 F
- [22] MS Blackman & others Commentary on the Companies Act (2002, with updates) vol 3 at 14-524.
- [23] Philotex (Pty) Ltd v Snyman [1997] ZASCA 92; 1998 (2) SA 138 (SCA) at 142H-I.
- [24] Ebrahim at paragraph [21]

[25] 2013 (3) SA 468 (SCA)

[26] At paragraph [31]

[27] 1921 AD 168

[28] 2004 (3) SA 465 SCA

[29] At paragraph [27]

[30] At paragraph [39]

[31] 1972 (3) SA 152 (C) at 161 - 162

[32]

[1895] 2 QB 1

[33] If there are other debts, they are not substantial. See paragraphs 46, record 21, and record 313.

[34] By Meskin, at 8.4.1

[35]

[1984] ZASCA 51; 1984 (3) SA 623 (A) at 634 - 635

[36] See *Pinfold and Others v Edge to Edge Global Investments Ltd* 2014

(1) SA 206 (KZD)

[37] Record P377

[38] P179/16

[39] 71/2008

[40] At P179 of the record

[41] 71 of 2008

[42] See record P436/5

[43] Record P474/2

[44] Record P474

[45] Record P454

[46] *Brassey* D2:15

[47] See also *Sheffield Electro Cording Plating and Enamelling Works Ltd v Metal Signs and Nameplates Pty Limited and Another* 1949 (1) SA 1034 (W) at 1039

[48] Record P444

- [49] Record P443
- [50] Record P26 Para 56.11
- [51] See Record P314 Para 69
- [52] Para 82, Record P42, Para 90, Record P319
- [53] See Para 91/Record 319
- [54] 1934 AD 239 at 304
- [55] 2012(1) SA 90 (SCA)
- [56] See further *James Brown and Hamer (Pty) Ltd (Previously named Gilbert Hamer and Co Ltd) v Simmons* NO 1963 (4) SA 656 (A) at 661H-662A where the Court said (at 913A): “In general it may be said that a person who testifies as a witness speaks for himself; he tells of what he, himself, knows and by his oath vouches for its truth. If he is an employee or agent in any respect of another and gives evidence in litigation to which that other is a party, he does so, not as an employee or agent, unless his admissions bind that party, but as a person speaking on oath to the facts in regard to which he testifies, and this is so whether he is called as a witness by his employer or principal or by the opposing litigant. Similarly, if he gives evidence in proceedings to which his employer or principal is not a party, although in relation to matters in which the latter has been or is concerned, he speaks as an individual; he is giving evidence, not taking part in the making of a contract or the giving of an undertaking on behalf of his employer or principal. His evidence in that case is not admissible against his employer or principal in a later case in proof of the facts stated in it. If called by his employer or principal, his evidence may, as that of any other witness called by that party, be regarded as evidence for that litigant and, so far as adverse to him, redound to his disadvantage, but that is because it is accepted as true, not because the witness is the employee or agent of the litigant.”

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