

**IN THE HIGH COURT OF SOUTH AFRICA  
(EAST LONDON CIRCUIT COURT)**

**CASE NO.: EL 718/2021**

**Heard on: 6 October 2022**

**Delivered on 13 December**

**2022**

In the matter between:

**KHAKA SIPUNZI**

**APPLICANT**

and

**YOUMESSI TRADING CC**

**FIRST RESPONDENT**

**AMOS YOUMESSI**

**SECOND RESPONDENT**

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**JUDGMENT**

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**MOLONY AJ:**

**Introduction**

[1] The applicant launched this application on 9 June 2021, seeking an order in the following terms:

- (a) That the business of the corporation (the first respondent) was carried on recklessly or for fraudulent purposes, or with the intent to defraud the applicant who is a judgment creditor of the first respondent.
- (b) In the alternative, that the incorporation and use of the first respondent by the second respondent constituted a gross abuse of the juristic personality of the first respondent as a separate entity.
- (c) That the second respondent be held personally liable, jointly and severally with the first respondent, for the debt incurred by the first respondent in terms of section 65, read with section 64(1) of the Close Corporations Act 69 of 1984 ('the Close Corporations Act'), alternatively in terms of the common law.
- (d) That the respondents pay the costs of this application on a punitive scale, including the cost of two counsel.

[2] The applicant, on 19 September 2022, launched an interlocutory application requesting leave to file the return of service for the second respondent (dated 17 June 2021), and to be permitted to pursue the relief sought in the main application. Costs were only requested in the event of opposition.

[3] It appears that the main application was on the opposed motion court roll on 24 February 2022, but was removed from the roll (by Matebese AJ) with the applicant to pay the costs of the day.

- [4] A request for reasons for the above-mentioned order was sought on 11 March 2022. The reasons provided by Matebese AJ were, in essence, the following:
- (a) The respondents had raised the issue of improper service of the application papers in their opposing papers.
  - (b) Counsel for the applicant then sought to introduce a return of service from the bar. When asked why the return had not been properly and timeously filed, the view taken by counsel was that there was nothing improper with the manner in which he sought to file the return of service.
  - (c) In opposed motion court matters, the court must be provided with all papers timeously, especially in relation to contentious issues, in order properly to prepare.
- [5] For the above reason, the interlocutory application was necessary.
- [6] The respondents (aside from taking issue in their heads of argument in the main application) did not formally oppose the interlocutory application, and I was satisfied, given the fact that the second respondent clearly knew of the main application (having filed notice to oppose, along with the first respondent, on 17 June 2021, and having deposed to an answering affidavit

on 21 July 2021) that the relief sought (in prayers 1 and 2 of the notice of motion) could be granted. This duly occurred.

### **Issues in dispute**

[7] The applicant is a practicing attorney, practicing as such under Sipunzi Attorneys.

[8] On 25 March 2015 the applicant purchased an entity called Hartwick Technical College ('the College') from the first respondent (represented by the second respondent, whom the applicant avers is the 'sole director'<sup>1</sup> of the first respondent), for the price of R 700 000.00.

[9] The purchase price was duly paid, however a dispute arose between the parties. It related to a request from the second respondent, who allegedly wanted the applicant to enter into a sub-lease agreement, apparently relating to the premises housing the College. The applicant wanted a lease agreement directly with the owner of the property, and demanded assignment or cession or transfer of all business interests, together with operational licenses, in regard to the College, as the College had been sold to the applicant as a going concern. The applicant refused to pay any rental absent the aforementioned.

[10] This led to the first respondent instituting action proceedings (in this court) against the applicant for outstanding rental, under case number 1057/2017

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<sup>1</sup> Incorrectly so, as the first respondent is a close corporation.

(‘the first action’). The parties will, when referencing the first action, be referred to as they are in the current application, in order to avoid confusion.

[11] The applicant defended the matter and launched a counterclaim seeking cancellation of the sale agreement, together with an order directing the first respondent to repay the applicant the sum of R 700 000.00.

[12] The above culminated in a judgment by Jolwana J (dated 19 January 2021), which dismissed the first respondent’s claim, and found in favour of the applicant in terms of the counterclaim which, *inter alia*, ordered that the purchase price of R 700 000.00 be repaid to the applicant by the first respondent.

[13] Attempts to execute on the judgment failed, according to the applicant, as the first respondent did not have any moveable or immovable assets. Attempts to attach moveable assets led to the discovery that the assets in question were owned either by the second respondent, or another close corporation (Silver Solutions 956 CC<sup>2</sup>).

[14] The applicant alleges that the second respondent is hiding behind the juristic personality of the first respondent, and is abusing the juristic personality of the first respondent, as he represented the first respondent during the conclusion of the sale agreement, and misrepresented certain material aspects to the applicant during the course of concluding the sale agreement.

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<sup>2</sup> According to the judgment of Jolwana J in the first action (in paragraph 11 thereof), this was the entity reflected as the landlord in the lease agreement presented to the applicant by the second respondent, which the applicant refused to sign.

- [15] The applicant is requesting that this court accept the findings of Jolwana J in the first action as proof of the alleged abuse of juristic personality, and grant the relief sought on that basis.
- [16] The first and second respondents have opposed the application.
- [17] The answering affidavit has been deposed to by one **FABRICE GAEL KOMBOU**, who refers to himself as being the sole member of the first respondent since 5 February 2021.
- [18] The first respondent opposed the application on the following grounds:
- (a) This claim should have been launched via action proceedings, as there are numerous disputes of fact (this is raised as a first point *in limine*). The respondents should be permitted properly to ventilate their defence by way of oral evidence and other evidentiary sources. It is denied that the first respondent carried on business recklessly or fraudulently, or with the intent to defraud the applicant. It is denied that the use of the first respondent constituted a gross abuse of the juristic personality of the first respondent, or that the second respondent should be held liable for the debts of the first respondent.
  - (b) Amongst the factual disputes referred to, the first respondent disputed the applicant's version in relation to the sub-lease dispute, averring that

whilst the first respondent used to act as an agent on behalf of the owner of the property, and as a result of various other tenants not paying timeously (or creating inconvenience) it was sought that a lease agreement be signed.

- (c) According to the first respondent, the applicant thereafter ran the College. The applicant only brought his concerns regarding the College not being a going concern (which the first respondent denied), and the issue of no direct lease agreement with the owner, to the first respondent's attention when the applicant filed his plea in the first action on 28 May 2019. It is averred that at no time did the respondents affect the applicant's ability to approach the owner of the property to arrange for a lease agreement – it was the owner that did not want to lease directly to the applicant.
  
- (d) The first respondent has annexed to his answering affidavit proof of payment of rental from the applicant who, avers the first respondent, was running the College. The relevant annexure shows an email from the applicant to one Deon Stander (who appears to be the attorney of record for the respondents in the current matter) and reflects a payment of R 10 000.00 to Deon Stander Attorneys, paid on 7 March 2017. In the aforementioned email the applicant apologized for delayed payment, stating that it was because of students who were failing to pay their fees on time.

- (e) According to the first respondent, there was only one applicable license to be provided to the applicant, which was a computer literacy accreditation, and which was handed over to the applicant when the business was sold to the applicant on 25 March 2015. The applicant ran the College from 2015 to 2017.
- (f) The first respondent avers (as a second point *in limine*) that a creditor who wishes to rely on section 64 and 65 of the Close Corporations Act (or the common law) must show that the respondent was knowingly party to the carrying-on of the business of the close corporation recklessly, with gross negligence or with intent to defraud any person or for any fraudulent purpose. The applicant has failed to show that the second respondent at all times acted as an agent for the first respondent. The applicant has failed to show that the second respondent misappropriated funds for his own benefit, and on the first respondent's behalf as required in terms of section 64 of the Close Corporations Act.
- (g) The first respondent denied that the applicant made due and reasonable demand of the first respondent. There was, in addition, no proper investigation conducted in regard to the first respondent's financial affairs and ability to pay its debts when they became due, as well as the functioning and competence of the first respondent, and the role and function played by the second respondent in regard to the first respondent.



(h) Any improper conduct on the part of the second respondent was denied.

(i) The first respondent further avers that the applicant's cause of action has prescribed.

[19] The first respondent has requested that the application be dismissed with a punitive costs order.

[20] The second respondent also filed an answering affidavit, disclosing grounds of opposition which are essentially the same as those advanced by the first respondent. The second respondent raised prescription as a first point *in limine*, whilst the failure to launch this matter via action proceedings, and the failure to make out an appropriate case in regard to reliance on sections 64 and 65 of the Close Corporations Act (alternatively the common law in this regard), are both raised as a 'second point *in limine*'.

[21] The applicant, in reply, questioned how the deponent of the answering affidavit for the first respondent had any personal knowledge of what occurred, denied the factual sequence of events contained in the answering affidavit, denied that there are any disputes of fact, and averred that insofar as showing that the second respondent at all material times acted on behalf of the first respondent, with an intention to defraud the applicant, '*one need to look no further than 2<sup>nd</sup> Respondent's evidence under oath on the transcript*

*and the findings of this Court on its judgment under case No. EL 1057/2017, all of which is binding on 2<sup>nd</sup> Respondent.'*

[22] Whilst a copy of the judgment of Jolwana J is annexed to the founding affidavit, no copy of the transcript (or any other evidence) has been provided.

[23] The applicant's reply to the second respondent's answering affidavit, similar to the reply to that of the first respondent, amounts to a bare denial.

## **Analysis**

[24] Sections 64 and 65 of the Close Corporations Act state 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.

**65 Powers of Court in case of abuse of separate juristic personality of corporation**

Whenever a Court on application by an interested person, or in any proceedings in which a corporation is involved, finds that the incorporation of, or any act by or on behalf of, or any use of, that corporation, constitutes a gross abuse of the juristic personality of the corporation as a separate entity, the Court may declare that the corporation is to be deemed not to be a juristic person in respect of such rights, obligations or liabilities of the corporation, or of such member or members thereof, or of such other person or persons, as are specified in the declaration, and the Court may give such further order or orders as it may deem fit in order to give effect to such declaration.'

[25] In the first action the second respondent testified on behalf of the first respondent, but was not a party to the litigation. It appears further that Jolwana J refused to accept a belated attempt to introduce certain evidence on behalf of the first respondent.<sup>3</sup>

[26] The judgment of Jolwana J concluded, on the evidence available in that matter, that the College did not exist when it was sold, stating as follows in paragraph 37:

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<sup>3</sup> See paragraph 14 of the judgment in the first action.

'On a preponderance of probabilities the college that was sold did not exist, was probably a sham or even fraudulence on Mr Youmessi's part. What is troubling was his audacity to come to this Court to enforce a lease agreement based on a possibly fraudulent transaction of a sale of a business that did not exist for premises that were probably never occupied or really handed over for occupation to the defendant.'

And in paragraph 38:

'It is difficult to avoid the suspicion that the sale of business agreement was deliberately designed to give credence to the existence of the college that was sold as a going concern and to hide the fact that it was possibly a fraudulent vehicle true (sic) which the defendant, despite being an attorney was duped into parting with R 700 000.00 for nothing, exploiting his gullibility.'

And in paragraph 43:

'The plaintiff's case was, both in respect of his claim for arrear rentals and in respect of the plea to the counterclaim badly pleaded. Mr Youmessi's evidence in respect of both the main claim and the counterclaim was not only so inadequate as to be non-existent and connived. It was also founded on falsity craftily designed to cover the possible rental fraudulence he sought to enforce in these proceedings or the fleecing of the defendant which was done with near perfection.'

[27] The first respondent's claim was dismissed, and the applicant's counterclaim upheld, with the sale agreement being set aside and restitution ordered, on the basis that the applicant had been fraudulently deceived into signing a document to buy a non-existent school. There does not appear to have been any attempt to appeal the judgment.

[28] Both parties relied, *inter alia*, on the matter of *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd and Others*<sup>4</sup> in regard to the issue of piercing the corporate veil, as would be required in order to grant the relief sought by the applicant. In that regard the following was stated in the *Cape Pacific* matter:<sup>5</sup>

'It is trite law that '(a) registered company is legal persona distinct from the members who compose it' (*Dadoo Ltd and Others v Krugersdorp Municipal Council* 1920 AD 530 at 550). 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 for 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) as if there were no dichotomy between such person and the company (*Henochsberg* on the Companies Act 5th ed vol 1 at 54). In that way personal liability is attributed to someone who misuses or abuses the principle of corporate personality.

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<sup>4</sup> 1995 (4) SA 790 (A).

<sup>5</sup> *Supra* at pp. 802E - 803B.

The law is far from settled with regard to the circumstances in which it would be permissible to pierce the corporate veil. Each case involves a process of enquiring into the facts which, once determined, may be of decisive importance. And in determining whether or not it is legally appropriate in given circumstances to disregard corporate personality, one must bear in mind

'the fundamental doctrine that the law regards the substance rather than the form of things - a doctrine common, one would think, to every system of jurisprudence and conveniently expressed in the maxim *plus valet quod agitur quam quod simulate concipitur*',

(*Dadoo Ltd and Others v Krugersdorp Municipal Council* (supra at 547).) Whatever the position, it is probably fair to say that a court has no general discretion simply to disregard a company's separate legal personality whenever it considers it just to do so (*Botha v Van Niekerk en 'n Ander* 1983 (3) SA 513 (W) at 524A; Gower's *The Principles of Modern Company Law* 5th ed at 133).'

And:<sup>6</sup>

'The principle of a company's separate juristic personality was first asserted in the House of Lords in *Aron Salomon v A Salomon and Co Ltd* [1897] AC 22. There already it appears to have been recognised that proof of fraud or dishonesty might justify the separate corporate personality of a company being disregarded. (See, in this regard, the speeches of Lord Halsbury at 33 and Lord Macnaghten at 52-3.) And over the years it has come to be accepted that fraud, dishonesty or improper conduct could provide grounds for piercing the corporate veil. Recently this was confirmed in *The Shipping Corporation of India Ltd v*

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<sup>6</sup> *Supra* at pp. 803C - 804D.

Evdomon Corporation and Another 1994 (1)\_SA\_550 (A) where Corbett CJ expressed himself as follows at 566C-F:

'It seems to me that, generally, it is of cardinal importance to keep distinct the property rights of a company and those of its shareholders, even where the latter is a single entity, and that the only permissible deviation from this rule known to our law occurs in those (in practice) rare cases where the circumstances justify "piercing" or "lifting" the corporate veil. And in this regard it should not make any difference whether the shares be held by a holding company or by a Government. I do not find it necessary to consider, or attempt to define, the circumstances under which the Court will pierce the corporate veil. Suffice it to say that they would generally have to include an element of fraud or other improper conduct in the establishment or use of the company or the conduct of its affairs. In this connection the words "device", "stratagem", "cloak" and "sham" have been used. . . .'

Two matters arising from the quoted passage merit further comment. First, reference is made to 'those (in practice) rare cases where the circumstances justify "piercing" or "lifting" the corporate veil'. It is undoubtedly a salutary principle that our Courts should not lightly disregard a company's separate personality, but should strive to give effect to and uphold it. To do otherwise would negate or undermine the policy and principles that underpin the concept of separate corporate personality and the legal consequences that attach to it. But where fraud, dishonesty or other improper conduct (and I confine myself to such situations) is found to be present, other considerations will come into play. The need to preserve the separate corporate identity would in such circumstances have to be balanced against policy considerations which arise in favour of

piercing the corporate veil (cf Domanski 'Piercing the Corporate Veil-A New Direction' (1986) 103 SALJ 224). And a court would then be entitled to look to substance rather than form in order to arrive at the true facts, and if there has been a misuse of corporate personality, to disregard it and attribute liability where it should rightly lie. Each case would obviously have to be considered on its own merits.<sup>7</sup>

The second is the reference to the inclusion of 'an element of fraud or other improper conduct in the establishment or use of the company or the conduct of its affairs'. (My emphasis.) It is not necessary that a company should have been conceived and founded in deceit, and never have been intended to function genuinely as a company, before its corporate personality can be disregarded (as appears in some respects to have been the view of the trial Judge - see the judgment at 821G-J). As Gower (op cit) states (at 133):

'It also seems clear that a company can be a façade even though it was not originally incorporated with any deceptive intention; what counts is whether it is being used as a façade at the time of the relevant transactions.'

Thus if a company, otherwise legitimately established and operated, is misused in a particular instance to perpetrate a fraud, or for a dishonest or improper purpose, there is no reason in principle or logic why its separate personality cannot be disregarded in relation to the transaction in question (in order to fix the individual or individuals responsible with personal liability) while giving full effect to it in other respects. In other words, there is no reason why what amounts to a piercing of the veil pro hac vice should not be permitted.'

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<sup>7</sup> My emphasis.



- [29] The applicant asks this court to grant the requested relief on the basis of the outcome of a judgment in a separate action, submitting that any disputes of fact raised by the respondents have already been determined by the judgment of Jolwana J.
- [30] The court in the first action in essence determined that the second respondent, when representing the first respondent during the sale negotiations, fraudulently misrepresented to the applicant that a business existed which did not in fact exist.
- [31] The court in the first action was not called upon to decide whether or not, in so doing, it followed that the business of the first respondent was carried on recklessly or for fraudulent purposes, or with the intent to defraud the applicant as the judgment creditor of the first respondent. Nor was it called upon to decide whether or not, given the circumstances, the incorporation and/or use of the first respondent by the second respondent constituted a gross abuse of the juristic personality of the first respondent. The court in the first action was not called upon to decide that the second respondent should be held personally liable, jointly and severally with the first respondent, for the debt incurred by the first respondent.
- [32] In the matter of *Prinsloo NO and Others v Goldex 15 (Pty) Ltd and Another*<sup>8</sup> the following caution was sounded:

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<sup>8</sup> 2014 (5) SA 297 (SCA).

[18] This brings me to the appellants' second proposition: that it was inappropriate and unwise for Webster J to find Prinsloo guilty of fraud purely on the basis of allegations against him on affidavit, which he disputed on feasible grounds. This proposition emanates from the same considerations as the previous one. The appellants were also entitled to have their version approached with caution on the basis that it could only be rejected if it were clearly untenable, which it was not. What rendered a final rejection of the appellants' version in principle even more unwise and inappropriate was, of course, that, as the respondents' version could not be rejected out of hand, the application was in any event bound to fail.

[19] I therefore agree with the appellants' contention that Webster J should not have made a finding of fraud against Prinsloo on the basis of untested allegations against him on motion papers that were denied on grounds that could not be described as far-fetched or untenable. The reasons why he should not have done so derive not only from common sense, but from many years of collective judicial experience. They were thus formulated in *Sewmungal and Another, NNO v Regent Cinema* 1977 (1) SA 814 (N) at 819A – C:

'In approaching this particular type of problem [of factual disputes arising on affidavit] it is not wrong for a court at the outset to have some regard to the realities of litigation. What appears to be a good case on paper may become less impressive after the deponents to the affidavits have been cross-examined. Conversely, what appears to be an improbable case on the affidavits, may turn out to be less

improbable or even probable in relation to a particular witness after he had been seen and heard by a court. An incautious answer in cross-examination may change the whole complexion of a case.”<sup>9</sup>

[33] The applicants, instead of asking this court to decide the matter on motion, go one step further and ask, on motion, that the findings in the first action be adopted as the findings of this court, with the logical conclusion allegedly being that the relief sought should be granted.

[34] In the first action the court had before it *inter alia* the original sale agreement, as well as the lease agreement that the applicant allegedly refused to sign. It also had the benefit of observing the witnesses who testified, and hearing the oral evidence tendered on behalf of the parties.

[35] Certain discrepancies, arising from the papers in this matter, accordingly cannot be addressed.

[36] For example, according to Jolwana J the applicant never paid any rental whatsoever for the premises upon which the College was apparently located.<sup>10</sup> This is confusing when considered in conjunction with the email from the applicant (dated 7 March 2017), annexed as ‘FK3’ to the first respondent’s answering affidavit in this matter, to the respondents’ attorney of record, apologising for a delayed payment (which the respondents aver is a

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<sup>9</sup> See further *Pepkor Holdings Ltd and Others v AJVH Holdings (Pty) Ltd and Others* 2021 (5) SA 115 (SCA) at para 39.

<sup>10</sup> See para 25 of the judgment in the first action.

rental payment) and referring to students failing to pay their fees on time. The full purchase price of R 700 000.00 had been paid by 30 September 2015, and so the aforementioned payment could presumably not have been in relation to the purchase price. The applicant does not address this aspect in reply, save to deny it.

[37] The above takes on some significance when it is noted that the judgment of Jolwana J does not appear to refer to any evidence being tendered on behalf of the applicant in relation to what he actually did with the College between 2015 and 2017.

[38] The second respondent was not a party to the first action, and the approach to the litigation may have been entirely different from the respondents' side had that been the case.

[39] The applicant, as proof of his attempts to execute in regard to the debt owed by the first respondent, emanating from the first action, has annexed to his founding affidavit two returns of service.

[40] The first (annexure 'SK2') is dated 12 May 2021 and reflects an attempt to attach the second respondent's moveable assets at the home address of the second respondent, despite it being the first respondent that was liable for the debt.

- [41] The second (also annexure 'SK2') is dated 14 May 2021, and discloses an attempt to demand payment from the second respondent (on behalf of the first respondent) at the business address of the first respondent. It is recorded that the first respondent is unable to pay the judgment debt and costs in full or in part, whereupon it appears a vehicle (apparently belonging to Silver Solutions 956 CC) was attached on the instructions of the applicant.
- [42] The applicant avers that he conducted an investigation to establish whether the first respondent had any immoveable assets against which he could execute, and established that no assets were registered in the name of the first respondent. No further information or documentation is provided in this regard.
- [43] Whilst it does not appear to be necessary that the applicant comprehensively pursue execution against the first respondent before taking action against the second respondent,<sup>11</sup> the fact remains that aside from the above-mentioned returns of service, the applicant provides no further information in relation to the first respondent's ability to pay its debt,<sup>12</sup> and relies entirely on the judgment in the first action in claiming the relief sought in this matter.
- [44] In my view the applicant has not made out an appropriate case for the relief sought, as he has asked that the findings of another court be adopted as the findings of this court (absent sight of any of the evidence before that court),

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<sup>11</sup> See *Cape Pacific (supra)* at p. 805G - 806C.

<sup>12</sup> See *L & P Plant Hire Bk en Andere v Bosch en Andere* 2002 (2) SA 662 (SCA) at the headnote and paras 39 - 40 and *Saincic and Others v Industro-Clean (Pty) Ltd and Another* 2009 (1) SA 538 (SCA) at paras 26 - 30.

and that this court use those findings to reach conclusions in relation to issues which were not before the original court.<sup>13</sup>

[45] It was submitted on behalf of the applicant that sections 64 and 65 of the Close Corporations Act require that this matter be determined on application.

[46] In my view the above-mentioned sections are not limited in such a manner, and it is open to the applicant to launch action proceedings in this regard.<sup>14</sup>

[47] Even if I am wrong in regard to the above it would be impossible, in my view, appropriately to determine this matter on affidavit as the factual matrix of the applicant's entire claim is provided via the judgment of another court, meaning that the relevant issues have not been properly ventilated before this court. Such ventilation could only, in these circumstances, occur by way of appropriate oral and documentary evidence being provided.

[48] Rule 6(5)(g) of the Uniform Rules states as follows:

'Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as it deems fit with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the foregoing, it may direct that oral evidence be heard on

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<sup>13</sup> These circumstances are, in my view, distinguishable from the circumstances in the *Cape Pacific* matter (*supra* at p. 806C-J), in which a factual finding made in a previous action was combined with a finding in a subsequent action (which did not involve all of the same parties), and thus given effect to in the subsequent action.

<sup>14</sup> See *Howard v Herrigel and Another NNO* 1991 (2) SA 660 (A) at 664 – 665 and *L & P Plant Hire* (*supra*) at para 27.

specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for such deponent or any other person to be subpoenaed to appear and be examined and cross-examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise.’

[49] Neither of the parties made a formal application<sup>15</sup> that the matter be referred to oral evidence, and it is undesirable that such an order be made by a court *mero motu*.<sup>16</sup> Nor would such a referral, in my view, serve any purpose, given the paucity of information contained in the founding affidavit.

[50] The application accordingly falls to be dismissed.<sup>17</sup>

## **Costs**

[51] All parties requested costs on a punitive scale.

[52] Whilst the applicant’s approach in this regard was ill-advised, it remains clear that he is simply attempting to recover a debt that is owed to him. Notably absent from the respondents’ affidavits was any information relating to how that debt might be paid by the first respondent.

[53] Given the above I see no reason why costs should not follow the result.

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<sup>15</sup> There is, at best, a passing reference to such a referral (as an alternative to dismissal) in the first respondent’s answering affidavit.

<sup>16</sup> See *Santino Publishers CC v Waylite Marketing CC* 2010 (2) SA 53 (GSI) at paras 2 – 5.

<sup>17</sup> See *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1162 and 1168.

**Order**

[54] In the result, the first respondent's first point *in limine*, and the second respondent's second<sup>18</sup> point *in limine*, is upheld, and the application is dismissed with costs.

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**N MOLONY**

**ACTING JUDGE OF THE HIGH COURT**

**On behalf of the applicants:      Adv Nzuzo**

**Instructed by:                      Sipunzi Attorneys**

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**On behalf of the first and second**

**respondents:                      Adv Burger**

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<sup>18</sup> Found at p. 60 of the paginated papers.



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