

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No. 54896

In the matter between:

GEORGE NETSHILINDI

First Appellant

MUNZHELELE JELIE NETSHILINDI

Second Appellant

DR SMALL t/a MARC'S KITCHEN

Third Appellant

and

GODONI CLOSE CORPORATION

First Respondent

MICHAEL TSHAMAANO TSHIKOTA Second Respondent

Coram: HEFER, HOEXTER, HOWIE, STREICHER JJA and

NGOEPE AJA Heard:

7 SEPTEMBER 1998 Delivered: 25

SEPTEMBER 1998

JUDGMENT

STREICHER JA/

STRETCHER JA:

The first respondent, Godoni CC ('the close corporation')

launched an application in the Venda Supreme Court ("the court a

quo") against the three appellants, the Magistrate of Thohoyandou, and

the Standard Bank of South Africa Limited ("the Standard Bank") for

the delivery of equipment and the transfer of money on the basis that

the close corporation was the owner of the equipment and entitled to

the money. The application was referred to trial and pleadings were

filed. When the declaration was filed the second respondent in this

appeal ("Tshikota") was joined as second plaintiff "in his personal

capacity in so far as it may be necessary for the second plaintiff to

represent the first plaintiff'. At the conclusion of the trial the court a

quo found that certain items of equipment which had been removed

from a Steers Franchise Business ("the restaurant") in Thohoyandou and which were in the possession of the first and the third appellants, were the property of the close corporation. The court a quo ordered the first and third appellants to deliver the items concerned to the close corporation. It also ordered the Magistrate of Thohoyandou to retransfer money which had been transferred to him from the Standard Bank account of the restaurant to an account which it ordered the second appellant to open in the name of the close corporation. The second appellant is the executrix in the deceased estate of the late Lwamondo Gilbert Netshilindi ("the deceased"). With the leave of the court a quo the three appellants appeal against these and certain ancillary orders.

The appellants failed timeously to file their notice of appeal with the registrar of this court and also to deliver the record of

the proceedings in the court a quo timeously. They filed applications for condonation of these failures. The applications were in the form of notices of motion and supporting affidavits. Subsequently they filed a petition for condonation of their failure to apply for condonation by way of petition. The respondents correctly concede that the failures of the appellants to comply with the rules of this court were not so serious as to justify a dismissal of the applications for condonation without reference to the appellants' prospects of success on the merits of the appeal. I shall therefore proceed to deal with the merits of the appeal. On 28 November 1991 Tshikota, the deceased and the Venda Development Corporation ("the VDC") entered into an agreement in terms of which it was agreed that Tshikota and the deceased would conclude a standard lease with the VDC in respect of Shop no 7, Standard Bank Complex, Thohoyandou ("the premises")

and that Tshikota and the deceased could assign all their rights and obligations under the agreement of lease to a close corporation which they intended forming. The lease was entered into on 3 December 1991.

The close corporation was formed on 18 November 1991 "to carry on business as fast food retailers through various outlets in Venda" The deceased and Tshikota each had a 50% interest in the close corporation.

On 3 December 1991 the deceased applied to the Standard Bank for an account to be opened in the name of Steers Food Outlet. In the application he requested the bank to regard him as the sole proprietor until written notice from him to the contrary had been received.

The close corporation, Tshikota and the deceased entered

into a franchise agreement with First Steer Fast Food Franchise Company (Pty) Ltd ("Steers") on 24 January 1992. In terms of the franchise agreement Steers granted them the right to conduct a Steers restaurant at the premises. Tshikota agreed with the deceased that the deceased would be responsible for the day to day running of the business of the restaurant whilst he, Tshikota, was furthering his studies at the University of the North.

On 21 February 1992 and again on 12 March 1992 the

deceased wrote a letter to Tshikota. In the first letter he complained that Tshikota had not contributed to the close corporation as he should have done. He stated that he was considering "terminating the Close Corporation" with immediate effect and asked Tshikota to indicate what he had decided. A copy of the first letter was enclosed with the second letter and Tshikota was once again asked to indicate what he

had decided. Tshikota denied receipt of the letters and testified that the

deceased knew that he was not at the address to which the letters had

been addressed.

Notwithstanding the franchise agreement entered into by

the deceased, Tshikota and the close corporation, the deceased, on 20

March 1992, entered into another franchise agreement with Steers in

terms of which the right to conduct a Steers restaurant at the premises

was granted to him personally. In April 1992 a licence was issued to

the deceased to conduct a restaurant on the premises and as from 16

April 1992 he did so. The deceased used his own funds to fit out the

premises. He, inter alia, bought equipment to the value of R140 613,88

from Steers. The items of equipment which the court a quo ordered the

first and third appellants to deliver to the close corporation were

amongst the items so purchased. The invoice in respect of the

equipment purchased was dated 27 April 1992 and was addressed to the deceased. Payment was effected by the deceased by way of two cheques, one for an amount of R70 613,82 and the other for an amount of R70 000.

Tshikota was unaware that the deceased had entered into a franchise agreement with Steers in his own name. He requested access to the financial documentation of the close corporation but his request was refused. On 29 August 1992 his attorneys wrote a letter to the deceased in which they stated that the deceased and Tshikota each had a 50% interest in the close corporation and that the close corporation was the franchisee and the lessee of the premises from which the restaurant business was being conducted. On behalf of Tshikota they demanded immediate access to all documentation of the close corporation and that Tshikota be furnished with such information

as he might require so as to acquaint himself with the activities of the

close corporation.

Tshikota' s request for access to the financial

documentation of the close corporation gave rise to an application by

the deceased for an order that the interest of Tshikota in the close

corporation be sold to the deceased. In the founding affidavit deposed

to by the deceased on 1 October 1992 he said:

"Since its registration, the corporation has established the Steers food outlet at the O.K. Complex, Thohoyando, which began to operate on 16 April 1992."

He added that he and Tshikota had orally agreed to each contribute

R50 000 to the corporation and that Tshikota had failed to pay the

balance of his contribution amounting to R30 000.

On 9 August 1993 Tshikota, through his attorneys,

demanded access to the accounting records of the close corporation

and also to the business of the close corporation being the restaurant conducted at the premises. The deceased's attorneys replied on 10 August 1993 that the financial statements were being finalized and that they would be made available to Tshikota immediately they became available. Ten days later, after receipt of another demand from Tshikota's attorneys, the deceased's attorneys advised that Tshikota could have immediate access to the Steers Restaurant conducted on the premises and to the books of account and financial statements of the close corporation. Regarding the financial statements of the close corporation they stated:

"It should be noted that the business only started operating during March/April 1992 and that the accounting officer is therefore attending to the financial statement for the period ending 28 February 1993."

On the same day on which the aforesaid letter was written, namely 18

August 1993, the deceased's attorneys wrote to Steers that when the franchise licence was granted to the deceased, the deceased and Tshikota started to operate the restaurant business as if the outlet was the property of the close corporation. They requested Steers to indicate what its attitude would be if the Steers outlet continued to be operated by the close corporation.

On or about 17 November 1993 the deceased's attorneys sent the financial statements of the close corporation for the year ended 28 February 1993 to Tshikota. These statements indicated that the close corporation owed the deceased R174 142,58 on loan account.

Steers was not satisfied with the way that the restaurant business was being conducted and threatened to terminate the franchise agreement. They suggested that a manager of their choice be appointed. On 20 January 1994 the deceased's attorney wrote to Steers that the

franchise agreement should be in the name of the close corporation and agreed to the appointment of a manager of Steers's choice. On 12 February 1994 Tshikota nevertheless launched an application for a mandatory interdict directing the deceased to allow Steers to appoint its own manager. In his answering affidavit the deceased admitted that the close corporation established the restaurant which began to operate on 16 April 1992. He stated furthermore that the franchise was granted to him personally, admitted that the restaurant was to be conducted in accordance with the franchise agreement and said that although the franchise was granted to him personally he agreed that the restaurant be run by the close corporation and that he be responsible for the day to day running thereof. The application was settled on 14 February 1994 on the basis that the deceased agreed to the appointment of a manager chosen by Steers and that all business cheques be

countersigned by Mr N Chikota, Tshikota's nominee.

On or about 14 October 1994 the deceased launched an application for the liquidation of the close corporation. In his founding affidavit the deceased again stated that the restaurant was established at the premises by the close corporation. He said that during the absence of Tshikota he had full and effective control of the close corporation but that Tshikota had suddenly returned and taken charge of the day to day running thereof. He said furthermore that he had no confidence in Tshikota's running of the business.

The deceased died on 12 April 1995. The second appellant was on 25 April 1995 appointed as the executrix in his estate. On or about 26 May 1995 and at the request of the second appellant, the first appellant removed equipment from the restaurant. The equipment so removed included the equipment which the court a quo

ordered the first and third appellants to deliver to the first respondent and which had been acquired from Steers. The first appellant sold some of the equipment to the third appellant. During May, and also at the request of the second appellant, Standard Bank transferred all moneys in the bank account of the restaurant to the Magistrate of Thohoyandou. The court a quo found that the deceased had initially personally acquired the equipment; that, during or about August 1993 he took a decision to transfer ownership in the equipment to the close corporation; and that transfer of ownership took place when he took that decision in that he was then acting in a personal capacity and also on behalf of the close corporation. As regards the money transferred from the bank account the court a quo found that the money also belonged to the close corporation. On this basis the court a quo held that the close corporation was entitled to the return of the equipment

and the money.

The appellants contend that the Findings by the court a quo were wrong. They submit that the fact that the Steers invoice for the equipment was addressed to the deceased and the fact that the deceased paid for the equipment are indications that the deceased and not the close corporation acquired the equipment. Furthermore, that there is no evidence of a subsequent intention on the part of the deceased to transfer ownership of the equipment to the close corporation. In regard to the bank account they submit that the account was in the name of the deceased and not of the close corporation and that there is no evidence that the account was used only for purposes of the close corporation's business.

From the foregoing it is clear that at least from 16 April 1992 when the restaurant started doing business the deceased

considered the restaurant to be the business of the close corporation.

During the period 1992 to 1995 he stated that the corporation

established the restaurant which began to operate on 16 April 1992;

that when the franchise licence was granted to him, he and Tshikota

started to operate the restaurant as if it was the property of the close

corporation; that the franchise agreement should be in the name of the

close corporation; and that, although the franchise was granted to him

personally, he agreed that the restaurant be run by the close

corporation. Moreover, he tried to acquire Tshikota's interest in the

close corporation; granted Tshikota access to the restaurant, the books

of account and the financial statements of the close corporation; sent

the financial statements of the close corporation for the year ended 28

February 1993 to Tshikota; agreed that all business cheques be

countersigned by Tshikota's nominee; applied for the liquidation of the

close corporation on the ground that he had no confidence in Tshikota's running of the business; and asked Steers what their attitude would be to the continued operation of the restaurant by the close corporation. In addition the financial statements which were compiled during 1993, were drawn up on the basis that, during the year ended February 1993, the restaurant had been conducted by the close corporation and not by the deceased personally. The appellants submit that the financial statements do not constitute admissible evidence against the appellants.

However, the statements were submitted to Tshikota by the deceased's attorneys in response to a demand by Tshikota that he be furnished with such statements. When the deceased's attorneys complied with that demand they said that the financial statements "should now indicate the financial situation of the close corporation". This statement constituted yet another admission that the restaurant was conducted by

the close corporation. I am mindful of the fact that the deceased concluded a franchise agreement with Steers in his own name and stated, when opening a bank account in the name of the restaurant, that he was to be regarded as the sole proprietor. However, all of that happened before 16 April 1992 and in accordance with the deceased's own admission it was the close corporation which started doing business on 16 April 1992.

According to the provisional balance sheet which formed part of the financial statements of the close corporation the close corporation owed the deceased R174 142,58 on loan account. At the time when the financial statements were made available to Tshikota, the deceased's attorneys said that he "was able to submit the necessary proof of his contributions" and asked for Tshikota's suggestions "on repayment of contributions to the CC". This statement similarly

constituted an admission by the deceased that the close corporation

owed him R174 142,58 on loan account.

At no stage did the deceased allege that the equipment for which he paid and which was used by the restaurant belonged to him or that he was entitled to rental in respect of the use of such equipment.

The aforesaid facts indicate, on a balance of probabilities, that the deceased was acting on behalf of the close corporation when he bought the items of equipment from Steers and paid for them; that the equipment was acquired by the close corporation; and that the purchase price which the deceased paid was credited to his loan account. Had that not been the case the deceased would have claimed some compensation for having made the equipment available to the close corporation. According to the provisional balance sheet the close corporation had fixed assets consisting of furniture and equipment in an

amount of R200 319,19. Had those fixed assets not included the equipment purchased by the deceased from Steers that would have been stated by the deceased in the various applications and in the correspondence with Thsikota.

The bank account was the account of the restaurant which was the business of the close corporation. According to Tshikota the deceased told him so and there is no reason not to accept that that was the case. The account was opened for the business and the deceased had his own personal account. Notwithstanding the deceased's request to Standard Bank when he opened the bank account that he be regarded as the sole proprietor of the restaurant, all the evidence, more specifically his own admissions referred to above, indicate that he was acting on behalf of the close corporation when he operated the account from 16 April 1992 onwards. Neither the deceased nor the second

appellant had the right to appropriate the money in that account.

The appellants finally submit that Tshikota did not have

authority to institute the proceedings on behalf of the close corporation.

The court a quo held that Tshikota was authorised to do so in terms of

section 50 of the Close Corporations Act, 1984 (Act 69 of 1984) ("the

Act"). The section provides as follows:

"50(1) Where a member or a former member of a corporation is liable to the corporation-

(1)

...

(2)

on account of-

(i) the breach of a duty arising from his fiduciary relationship to the corporation in terms of section 42; or

(ii) negligence in terms of section 43,

any other member of the corporation may institute proceedings in respect of any such liability on behalf of the corporation against such member or former member after notifying all other members of the corporation of his intention to do so."

The court a quo erred. The first claim for the delivery of equipment was not a claim against a member or former member of the close corporation and the cause of action in respect of the second claim was not based on the provisions of section 42 or 43 of the Act. The respondents therefore had to concede that section 50 did not authorise Tshikota to institute the proceedings on behalf of the close corporation.

However, on the pleadings, the contention that Tshikota was not authorised to institute the proceedings was not raised in respect of the close corporation as first plaintiff but was only raised in respect of Tshikota as the second plaintiff. The error of the court a quo does therefore not affect the outcome of the appeal and has no effect on the costs order as no additional costs were incurred by the joinder of Tshikota.

For these reasons I am of the view that there is no

prospect of the appeal succeeding on the merits.

The applications for condonation are refused with costs

including the costs of appeal.

P E STREICHER
JUDGE OF APPEAL

HEFER JA) HOEXTER JA)
Concur HOWIE JA)
NGOEPE AJA)