THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE
CASE NO: 293/2004

In the matter between

NAVY TWO CC **APPELLANT**

and

INDUSTRIAL ZONE LIMITED **RESPONDENT**

CORAM: **SCOTT, MTHIYANE, JAFTA, PONNAN JJA and MAYA AJA**

HEARD: **6 SEPTEMBER 2005**
DELIVERED: **28 SEPTEMBER 2005**

Summary: Sole member of a close corporation seeking to represent it - whether refusal to grant him audience misdirection – whether case fell within exception to rule barring a person who is not a practitioner from representing a corporate entity – whether refusal to grant postponement was justified – default not adequately explained - bona fide defence not disclosed - circumstances in which a court will grant indulgence discussed.

JUDGMENT

MTHIYANE JA:

MTHIYANE JA:

[1] This is an appeal against the judgment of Brassey AJ sitting in the Johannesburg High Court, in which he refused to grant the appellant, a close corporation, a postponement to file an answering affidavit and to allow its sole member, Mr Ashum Kumar Nannen, to represent it during the hearing of the application for a postponement. The appeal is with the leave of the learned judge.

[2] The background facts are briefly the following. On 14 December 2001 the appellant and the respondent concluded an agreement of sale in terms of which the appellant was required to make certain payments. The appellant fell in arrears with those payments and various accommodations were granted in order to assist it, which were ultimately fruitless. Notice of cancellation was given in terms of the agreement of sale. The cancellation clauses in the agreement provided for 14 days' notice to be given to the defaulting party to rectify the defect, failing which cancellation would be permissible. The notice upon which the appellant relies was issued on 4 March 2003 and expired accordingly on 18 March 2003. The notice appears to have been served on the appellant at its place of business and signed for by one Kamal Singh. The respondent by implication denies that it received the notice.

[3] On 12 November 2003 the respondent launched an application in the Johannesburg High Court for an order declaring that the written agreement

concluded between the parties on 14 December 2001 had been validly cancelled and that it was of no force and effect.

[4] A Notice of Intention to Oppose was filed and served on the respondent on 14 November 2003 and thereafter no further steps appear to have been taken by the appellant. On 3 February 2004 the respondent set the application down for hearing on the opposed roll. The matter came before Blieden J and the appellant was represented by Mr Ashum Kumar Nannen, who is not a legal practitioner. The application was stood down until the following day (4 February 2004) to enable Mr Nannen to apply for a postponement.

[5] At the hearing before Blieden J Mr Nannen was apparently told that he would not be allowed to represent the appellant as he was not a legal practitioner. However on the following day (4 February 2004) he again appeared on behalf of the appellant and sought a postponement. Blieden J directed that Mr Nannen prepare and file an affidavit in support of his request for a postponement and indicated that he could himself bring the affidavit to court, a suggestion which counsel for the appellant submitted led Mr Nannen to think he could appear on behalf of the appellant.

[6] At the next hearing the matter came before Brassey AJ. The learned judge was prepared to receive the affidavit but refused to allow Mr Nannen to

represent the appellant as, reasoned the judge, a corporate entity could only be represented by a legal representative.

[7] The judge then as a compromise, perhaps, devised and embarked on some procedure whereby Mr Nannen was permitted to relay his submissions to the court through Mr Konstantinides, counsel for the respondent. The proceedings continued in that vein up until their conclusion when Brassey AJ made an order refusing the postponement and granted the respondent the relief it sought.

[8] The issue on appeal is whether the present matter is not one of those cases that fall within the exception to the rule barring a person who is not a legal practitioner from representing a corporate entity, where the court *a quo* should have exercised its discretion in favour of allowing Mr Nannen to represent the appellant. That the refusal to grant Mr Nannen audience arose from an erroneous belief on the part of the judge *a quo* that he had no discretion in the matter leaves of no doubt. That much is clear from what he said during the application for leave to appeal:

‘It is correct that I refused to give Mr Nannen an audience. I did so in the belief that a corporate entity could only be represented before me through a legal representative’.

[9] The question of representation of a corporate body by a natural person who is not a legal practitioner has been the subject of discussion in numerous

cases. One such case is *Yates Investment (Pty) Ltd v Commissioner for Inland Revenue*[1] where a beneficial shareholder sought to appear for a company to argue an appeal on its behalf. He was refused permission to do so. Without any detailed discussion of the rule and its source, presumably because on the facts of that case such discussion was not warranted, Centlivres CJ held that an artificial person could not appear in person and had to be represented by a duly admitted advocate.

[10] Following and applying the rule in *Yates Investment (Pty) Ltd v Commissioner for Inland Revenue*, Hurt J held in *Hallowes v The Yacht Sweet Waters*[2] that a juristic person can only litigate and appear before a court through a representative duly qualified and admitted to practise as such and that for practical purposes the doors of the court were closed to the close corporation.

[11] The decision in *Hallowes v The Yacht Sweet Waters* has been severely criticised in *Lees Import & Export (Pty) Ltd v Zimbabwe Banking Corporation Ltd*[3] as having overlooked the *caveat* placed upon the rule, recognising the court's residual power to regulate its own proceedings unless fettered by legislation. The *caveat* embodies a power which a court has, in the exercise of its discretion and in the interests of justice, to permit a person other than a legal

[1] 1956 (1) SA 364 AD.
[2] 1995 (2) SA 270 D at 273 C-D.
[3] 1999 (4) SA 1119 ZSC at 1126 A-D.

practitioner to appear before it on behalf of a corporate entity, but only if exceptional circumstances so warrant it.

[12] There is a lot to be said for the above criticism. It is clear that the rule limiting representation of a corporate entity to legal practitioners is not inflexible. In *Arbuthnot Leasing International Ltd v Havelet Leasing Ltd & others*[4], while accepting that the normal rule was that a body corporate must appear by counsel or solicitor, the court recognised that in certain exceptional circumstances, a director who is a party to litigation to which a company is also a party may be allowed to appear in person for purposes which are also those of the company.

[13] In *California Spice Marinade (Pty) Ltd and others in re: Bankorp v California Spice and Marinade (Pty) Ltd v others; Fair O'Rama Property Investments CC v others; Tsaperas; and Tsaperas*[5] after tracing the history of the rule in the English common law Wunsch J came to the conclusion that a court should be entitled, in an appropriate case and to avoid injustice, to allow at least a one-person company to be represented at a court hearing by its *alter ego*. The learned judge said that the inconvenience caused to the court as a result of an unqualified person appearing before it had to be weighed up against the

[4][1991] 1 ALL ER (CH D), at 597 to 598 a-h 599 a e g.
[5][1997] ALL SA 317 (W).

injustice of a juristic person being denied access to the courts. In this regard I agree with the reasoning of Wunsch J.

[14] Turning to the facts of this case it seems to me that very little of the court's time would have been taken up if Brassey AJ had allowed Mr Nannen to address him on the merits of the application for a postponement. The effect of his refusal was that the appellant was denied an opportunity to be heard. The defect was not remedied by the learned judge receiving the appellant's submissions through the respondent's counsel, Mr Konstantinides. In my view the refusal by Brassey AJ to exercise a discretion of granting Mr Nannen audience was a misdirection which entitles this court to interfere with his refusal to grant Mr Nannen audience and to consider the application for a postponement afresh. We have not been asked to remit the matter to Brassey AJ but to deal with it in this court. In this regard the appellant was required to satisfy two requirements: first, it had to show that the delay or failure to file an answering affidavit was not wilful and secondly, that it has a bona fide defence to the main application. I discuss the two requirements in turn.

[15] With regard to the question of delay Mr Nannen says upon receiving the papers in the main application he handed them to the appellant's erstwhile attorneys, Chibabhai Jivan Inc. of Mayfair, Johannesburg. The Notice of Intention to Oppose was filed on 21 November 2003 and no further steps were

taken. Mr Nannen says he paid the attorneys R10 000 by way of fees and thereafter continued to pay a retainer of R1 500 per week. He says further that he entertained 'a serious belief' that the matter would be attended to by the attorneys. He also says that before the papers in the present application were served he consulted with an advocate, presumably arranged by his erstwhile attorneys. He does not understand why the attorneys did not prepare, file and serve the opposing affidavits. No affidavit has been put up by any member of the attorneys' firm with whom he has had dealings, to corroborate his story. Of course this is not meant as a criticism – it is just an observation. There seems to have been a total lack of urgency on his part in attending to the matter. This is evidenced by the fact that Mr Nannen did not at any stage complain to the attorneys that the matter was not being attended to notwithstanding that he was presumably in constant contact with them on a weekly basis, seeing that he made weekly payments to them of the retainer of R1 500 at a time. It has been held that litigants 'cannot divest themselves of their responsibilities in relation to the action and then complain *vis-à-vis* the other party to the action that their agents, in whom they have apparently vested sole responsibility have failed them.' (See *De Wet and others v Western Bank*[6]).

[16] During December 2003 he consulted another firm of attorneys, SA Ebrahim, of Pretoria. He duly paid fees for consultation but nothing could be

[6]1979 (2) SA 1031 (AD) at 1044 C.

done as the attorneys were closing for the end of the year vacation. During the last week of December 2003 he was advised that a notice of set down of the present application had been served on his erstwhile attorneys on 17 December 2003. But for a reason not disclosed in the papers he waited until 31 January 2004 when he consulted a new firm of attorneys, AS Cassim and Co of Pretoria, the appellant's present attorneys of record. Mr Cassim of this firm told him that he could only represent the appellant if a postponement were granted. In his presence the attorney telephoned the respondent's attorneys requesting a postponement but this was refused.

[17] Mr Nannen says he is not to blame for the delay, the fault of which he places firmly at the door of the appellant's erstwhile attorneys. He says he does not understand the rules of court and the procedures. He urges that the appellant should not be prejudiced thereby.

[18] If Mr Nannen received notice of service of the papers in the present application, as he says he did, during the last week of December 2003, it is not clear why he only consulted his present attorneys of record on 31 January 2004. In paragraphs (a) and (b) of the Notice of Motion it is clearly stated that notice of opposition has to be given within *five* days of service of the application and the answering affidavit, within *fifteen* days thereafter. The notification is plain and does not require any legal knowledge to understand and to act upon it. Mr

Nannen's reliance on lack of knowledge of the rules and procedures does not assist. There is no explanation of what Mr Nannen did for the entire month of January 2004 after becoming aware of the service of the application on the appellant. The appellant sought the court's indulgence and yet did not see it fit to place facts from which the court could determine whether or not it was in wilful default in respect of the filing of an answering affidavit.

[19] As to the appellant's defence to the main application, there is yet again a glaring paucity of information. Mr Nannen says before the present application was served, he consulted with an advocate arranged by his erstwhile attorneys, who advised him that in order to cancel the contract of sale between the respondent and the appellant, the respondent had to serve notice of any breach. As far as the appellant was concerned the contract would therefore not be cancelled. This is a conclusion of some sort and the basis for it has not been disclosed. Finally Mr Nannen alleged that the respondent, too, was not prepared to perform certain contractual obligations, despite requests to do so. We are not told what those obligations are that were not complied with. That is the sum total of the appellant's defence. To my mind it is far from convincing. It is true that at this stage the appellant was not expected to set out his defence in full. But what was required of the appellant was to place facts from which the court could say that there was a bona fide defence to the main application.

[20] Notwithstanding the misdirection on the part of Brassey AJ occasioned by his refusal to permit Mr Nannen to address him on the merits, the refusal to grant a postponement was correct.

In the result the appeal is dismissed with costs, such costs to include the costs occasioned by the application for condonation.

KK MTHIYANE
JUDGE OF APPEAL

CONCUR:

JAFTA JA
MAYA AJA

PONNAN JA:

[21] I have had the benefit of reading the judgment of my brother Mthiyane. Although I agree with the conclusion to which he comes I do not endorse his approach.

[22] In my view the real issue is whether the appellant suffered any prejudice as a result of Brassey AJ's failure to afford Mr Nannen the opportunity to address the court on the issue of a postponement. In other words, it is unnecessary to consider the circumstances in which the so-called rule barring a non-legal person from representing a corporate entity may be relaxed. Even if it is accepted in the appellant's favour that Brassey AJ misdirected himself in this regard it does not follow that the appellant would have been entitled to the postponement it now seeks on appeal. The effect of such a misdirection on the part of the court *a quo* would be that this Court would be free to consider whether in all the circumstances a postponement should have been granted.

[23] The respondent's claim against the appellant is set out in detail in its founding affidavit in the court *a quo*. It is alleged that the appellant failed over a protracted period to meet its contractual obligations. The affidavit catalogues repeated instances of the appellant's failure to effect payment in terms of the agreement timeously or at all. Dishonoured cheques were the order of the day. By 30 March 2003 the appellant should in terms of the agreement have paid R797 065,79 (excluding interest). The appellant had in fact only paid R450 000,00.

[24] In the face of these persistent breaches, the respondent, through its attorney, delivered to the appellant on 4 March 2003, a notice calling upon it within 14 days of receipt to rectify its breach. In response the appellant furnished to the respondent certain letters of undertaking. According to investigations conducted by the respondent: the first, emanating from FNB, contained unauthorised alterations; and, the second, emanating from Engen was a forgery. On 8 July 2003 the respondent accordingly cancelled the agreement.

[25] These in a nutshell were the factual allegations that confronted the appellant. The response of Nannen on behalf of the appellant was:

‘ … I was advised that the deed of sale between the applicant and the respondent, the applicant had to serve notice of any breach of the contract in order to cancel the contract. The contract could therefore not be cancelled.’

The language employed by Nannen is curious. It is not in dispute that the respondent had to serve a notice of breach. Nor could it be. That flows from the agreement. Nannen does not assert positively that no such notice had been served. He likewise does not attempt to explain the signed acknowledgment of receipt endorsed on the notice. It is expected of the reader, it would seem, simply to infer, despite the respondent's detailed allegations to the contrary, that no such notice had in fact been delivered and consequently therefore there can be no cancellation. Nannen, moreover, makes not attempt to deal with the repeated breaches by the appellant detailed in the respondent's founding affidavit. Nor for that matter does he deal with the very serious allegations of fraud and forgery.

[26] He does confirm having received the application papers in the matter. According to him those papers he forwarded to the appellant's then attorney. Nothing appears to have been done. During December 2003, precisely when he does not say, he consulted S A Ebrahim, an attorney in Pretoria. On 31 January 2004 he consulted with A S Cassim also an attorney in Pretoria.

[27] He must undoubtedly have known that the necessary papers in opposition to the relief sought had not been served and filed. Why else would he have changed attorneys not once but twice? And yet aside from consulting with those attorneys he did nothing further. Nannen has chosen to be deliberately vague. His coyness must redound to his discredit. At the very latest by December 2003 when he consulted with attorney Ebrahim he must have known that no opposing affidavit had been filed. He seeks to explain that failure in the following terms: 'I cannot understand why my previous attorneys did not prepare opposing affidavits in this matter and did not inform me as to their reasons for not preparing and filing same with the applicant's attorneys and at the above honourable court'. That explanation is not only far from illuminating but is unsatisfactory. He says: '[I]f anyone is to be blamed, it is certainly not me on behalf of the respondent and we should therefore not be prejudiced thereby. The above honourable court should look towards my previous attorney's of records conduct in this matter'. This assertion rings hollow.

[28] In short, the appellant has failed miserably to explain its tardiness. A postponement was not there for the asking. The appellant had to make out a proper case in support of its application for a postponement. That it failed to do. Not only did it fail to explain with sufficient candour why no further steps had been taken by it in the matter but the affidavit ultimately filed on its behalf falls far short of establishing that it has a *bona fide* defence to the respondent's claim.

[29] Senior counsel who appeared on behalf of the appellant in this court sought to persuade us that on the basis of the affidavit filed by Nannen a postponement was justified. Everything that could be said in support of a postponement was said and debated in this Court. The appellant was undoubtedly placed in a better position than it would have been had it been left to a lay person to argue the matter. Nothing that was said in this court has caused me to believe that the circumstances were such that the decision to refuse a postponement was not the correct one. It follows that I agree that the appeal must fail.

V M PONNAN
JUDGE OF APPEAL

CONCUR:

SCOTT JA