THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT
Reportable
Case No: 1245/2019
APPELLANT
RESPONDENT
In the matter between:
MASIBUYISANE SERVICES (PTY) LTD
and
EQSTRA CORPORATION (PTY) LTD
Neutral citation: *Masibuyisane Services (Pty) Ltd v Eqstra Corporation (Pty) Ltd* (1245/2019) [2020] ZASCA 159 (1 December 2020)

Coram: MAYA P, DLODLO and NICHOLLS JJA and MATOJANE and SUTHERLAND AJJA

Heard: 2 November 2020

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, and by publication on the Supreme Court of Appeal website and release to SAFLII. The time and date for hand down is deemed to be 10h00 on 1 December 2020.

Summary: Consequences of conversion of a close corporation into a company in terms of s 29C(1) of the Companies Act 61 of 1973 and vice versa, in terms of the Close Corporation Act 69 of 1984 - validity of suretyship concluded by company after it had converted from a close corporation - company cited in suretyship as a close corporation - absence of any hiatus or interruption of juristic personality upon conversion - appeal dismissed

.**ORDER**

On appeal from: Gauteng Division of the High Court, Pretoria (Unterhalter J, sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

Sutherland AJA: (Maya P, Dlodlo and Nicholls JJA and Matojane AJA concurring):

Introduction

[1] The controversy, in this case, is one that only lawyers could appreciate. It concerns the consequences of a close corporation (CC) converting itself into a company. What happens if after that conversion a contract is concluded by the directors of the company in which contract the company is described as a close corporation? Can the company repudiate it on the grounds that it was concluded with an entity, ie the CC, that 'no longer exists'?

[2] The case originated when the respondent, Eqstra Corporation (Pty) Ltd (Eqstra), obtained, on 22 September 2014, a default judgment against the appellant, Masibuyisane Services (Pty) Ltd, wherein it was cited as Masibuyisane CC, in respect of a suretyship in the respondent's favour. The appellant wants the judgment to be rescinded. The basis for the rescission application is the proposition that the suretyship is invalid, for the reason mentioned. The court a quo refused to rescind the judgment, hence the appeal to this Court with the former's leave.

The material common cause facts

[3] Masibuyisane Services CC, was incorporated on 3 November 1998. This CC was converted into a company on 12 January 2006.

[4] On 23 October 2007 a document was brought into being which bore the masthead: 'Masibuyisane Services CC'. It stated:

'The members of Masibuyisane Services Close Corporation (1998/06325/23) hereby confirm that by resolution taken on Thursday 23 October 2007. Joseph Vusi Motha ... is authorised to sign all

documents in connection with the above company'.

It is notable that this memorial of the resolution referred to 'the above company' although what is earlier described is a CC not a company. The author ostensibly was comfortable by using such terms interchangeably. It is signed by three individuals. The first is Mr Andries Maseko, who plays a major role in the unfolding saga, not least as the deponent to the founding affidavit and replying affidavit in the rescission application. The second signatory is Mr Eric Nkosi. The third is Mr Joseph Motha, since deceased, the person who was authorised to sign the documents. Each is described identically as 'Member Masibuyisane'. It is common cause that all three were members of the CC and subsequently members and directors of Masibuyisane Services (Pty) Ltd.

[5] Maze Products (Pty) Ltd (Maze), was the principal debtor in a contract styled 'Full Maintenance Leasing Master Agreement'. Its terms are unimportant to the controversy. Two suretyships are concluded for the benefit of Maze. One was given by two individuals, Mr Zenzo Khanye and Ms Stenny Winifred Mathe. The other was given by 'Masibuyisane CC'.

[6] The suretyship by Masibuyisane CC was given on the same day as the resolution referred to above. The document is a template containing standard contractual terms, with blanks for the contracting parties to fill in details. The contracting party qua surety was described as 'Masibuyisane CC' of '35 Botha Avenue Witbank'. It is signed by Mr Motha. Among the several standard terms is clause 16, which chooses a domicilium citandi et excutandi at the address given in the document, ie 35 Botha Avenue Witbank. Notably, on 23 October 2007, the form of the appellant was that of a company and not a CC.

[7] On 20 August 2009 Masibuyisane (Pty) Ltd re-converted itself into a CC. On 5 July 2013 Masibuyisane CC re-re-converted itself into a company.

[8] On 6 May 2014 Eqstra sued Maze and its sureties. Eqstra cites 'Masibuyisane

CC' as the fourth defendant. On 15 May 2014, service was effected on the domicilium stated in the suretyship. The sheriff tacked the summons to the principal door.

[9] On 11 June 2014, Eqstra made the first attempt to secure a default judgment. The registrar referred it to open court and judgment was granted on 22 September 2014. The order described the fourth defendant as 'Masibuyisane CC'.

[10] The writ of execution subsequently issued, dated 7 October 2014, describes the party to be served as 'Masibuyisane CC'. The sheriff issued a nulla bona return of service dated 3 November 2014. In the return, it is stated that it was served at 35 Botha Avenue Witbank and that it was served on 'Mr Maseko. ' The sheriff recorded that he was told that the 'Business has changed to Masibuyisane (Pty) Ltd'.

[11] On 14 April 2016, the writ was re-issued. It now directed the sheriff to execute on 'Masibuyisane (Pty) Ltd'. No evidence of its fate is on record.

[12] On 3 May 2018, the writ was again re-issued. The party stated to be subject to execution was now described as 'Masibuyisane (Pty) Ltd, (previously Masibuyisane CC)'. The execution of the writ was effected.

[13] In response, the appellant launched a rescission application on 30 May 2018.

The statutory framework concerning conversions

[14] The legislation concerning the conversion of corporate identity includes the Close Corporations Act 69 of 1984 (CC Act), the Companies Act 61 of 1973 (1973 Companies Act) and the Companies Act 71 of 2008 (2008 Companies Act). These statutes regulate the manner and legal consequences of conversions by a CC into a company and vice versa. The corresponding provisions in the relevant statutes addressing conversion all reflect the singularity of juristic personality and the absence of any multiple identities in consequence of a conversion one way or the other. The relevant provisions are these:

(a) Section 2(2) of the CC Act, which reads:

‘A corporation formed in accordance with the provisions of this Act is on registration in terms of those provisions a juristic person and continues, subject to the provisions of this Act, to exist as a juristic person notwithstanding changes in its membership, or its conversion to a company in terms of Schedule 2 of the Companies Act, until it is deregistered or dissolved -

(a) in terms of this Act; or

(b) in terms of the Companies Act, in the case of a juristic person that has been converted to a company.'

(b) Section 29D(1) of the 1973 Companies Act, which reads :

‘(a) On the registration of a company converted from a close corporation, all the assets, liabilities, rights and obligations of the corporation shall vest in the company.

(b) Any legal proceedings instituted before the registration by or against the corporation, may be continued by or against the company, and any other thing done by or in respect of the corporation, shall be deemed to have been done by or in respect of the company.

(c) The juristic person which existed as a close corporation before the conversion shall notwithstanding the conversion continue to exist as a juristic person, but in the form of a company.'

(c) Item 2(2) of Schedule 2 of the 2008 Companies Act, which reads:

‘On the registration of a company converted from a close corporation -

(a) the juristic person that existed as a close corporation before the conversion continues to exist as a juristic person, but in the form of a company'.

The validity of the suretyship

[15] On appeal before us, it was fairly conceded on behalf of the appellant that if the suretyship was held to be valid the appellant's case collapsed. It is therefore appropriate to dispose of this issue at the outset.

[16] The critical propositions advanced on behalf the appellant were articulated thus:

(a) Although a single juristic person indeed continues to exist throughout when a CC converts into a company, the *form* of that juristic person carries paramount significance as regards its dealings in contract.

(b) Conversion of a CC into a company extinguishes the CC’s existence.

(c) Accordingly, a contract describing a contracting party as a CC when the CC no longer exists is invalid and unenforceable against the company.

[17] It is plain that these contentions are self-contradictory and lack cogency, as is illustrated hereafter.

The judgment a quo

[18] Unterhalter J, after considering the statutory provisions, held thus:

'The language and purpose of these provisions is to my mind clear. The conversion of a close corporation into a company does not bring into existence a different juristic person. The same juristic person continues, but simply in another form, now as a company rather than as a close corporation. The question that arises in this matter is whether the juristic person that had the form of a company could undertake the suretyship obligation when it signed the suretyship and provided a resolution in the name of the close corporation from which it had been converted. In my view the suretyship binds the company. The juristic person that is undertaking the obligations of the suretyship is not a different person, it is the same person but simply in a different corporate form. When the resolution was given by a member of Masibuyisane Services CC in order to enter the suretyship and when Mr Motha then signed the suretyship he acts to bind the very entity that does exist, that is to say the company, even though they are giving expression to their agreement in the corporate form of a close corporation, that is now in the corporate form of a company. That does not prevent the same juristic person from assuming the obligations of the suretyship simply because the assent to be bound is given in the form of a close corporation rather than a company, which close corporation has been converted into a company.'

[19] This conclusion was reached in the face of a contention, on behalf of the appellant, that the decision in *Townsend Productions (Pty) Ltd v Leech and Others*[1] was authority for the proposition that a CC and a company were two distinct persons and that, in consequence, the suretyship concluded under the circumstances described, was with a non-existent person. The facts in *Townsend* were that an employer had concluded restraint of trade agreements with two employees. The first restraint was concluded at a time when the employer was a company. Thereafter it

1 *Townsend Productions (Pty) Ltd v Leech and Others* 2001 (4) SA 33 (C); [2001] 2 All SA 255 (C).

was converted into a CC. A second restraint agreement was concluded with another employee thereafter in a document which nevertheless incorrectly described the employer as a company. The first restraint was held to be valid because of s 29D(1) *(£>*J of the 1973 Companies Act, which provides that whatever was done prior to conversion remains binding. The second restraint was held to have been concluded with a 'non-existent' company and was invalid.

[20] The passage in *Townsend* relied on by the appellant is at 45F-46B:

'Mr *Dickerson's* further argument that para *(c)* [i.e. s 29D(1)*(c)* of the 1973 Companies Act] perpetuates the existence of the same legal entity, only under a different name, cannot be sustained. In *Morsner v Len* 1992 (3) SA 626 (A) it is made clear that the Close Corporations Act 69 of 1984 "het 'n nuwe soort regspersoon daargestel"[2] (at 631A). The purpose of the insertion of s 29D into the Act was to provide continuity where one kind of juridical person is converted into another kind of juridical person:

"Juis omdat 'n ander soort regspersoon (met die onderskeidende kenmerke waarop reeds gewys is) in die lewe geroep is, was dit nodig ter wille van kontinuïteit om die bepalings van art 29D(1) tot die Maatskappywet by te voeg."[3]

(Morsner v Len (supra at 631H).)

The very provision for continuity reinforces the distinctive identity of the juridical persons.

The restraint relied upon by the applicant is, *ex facie* the written instrument in which it is embodied, a restraint in favour of a legal entity which is not the applicant.

The applicant's claim against the second respondent accordingly falls to be dismissed on the ground that the applicant has failed to prove that the second respondent is in breach of a restraint agreement between herself and the applicant'.

[21] In response, Unterhalter J thereupon stated:

'. [the judgment in *Townsend]* understands [ss *29D(1)(b)* and 29(1) of the 1973 Companies Act] to indicate that there are distinctive juristic persons that come about upon the conversion from a close corporation into a company or vice versa. That interpretation of the relevant provisions of the Companies Act does not, with respect, appear to me to be correct. The very same entity

2 In translation: 'establish a new sort of juristic person'. (My translation.)

3 In translation: 'precisely because a different sort of juristic person (with the distinguishing characteristics to which reference has already been made) it was necessary, in the interests of continuity, to include the provisions of section 29D(1) to the Companies Act.' (My translation.)

continues to exist. The form of the entity, as the language, makes plain in section 29D[(1)]*(c)*, changes, but the entity that is capable of undertaking obligations is the same. Insofar as the *Townsend* decision comes to a different view as to the consequences of conversion, I am in respectful disagreement . . . Mr Heyns . . . for the applicant, stressed the language in s 29D[(1)] *(c)*: "But in the form of a company". That language, however, does not seem to me to alter the essential point which is this: *a juristic person that has a continued existence may assume an obligation even when the expression which is given to the assumption of that obligation takes place in the form of a now superseded CC.'* (Emphasis added.)

[22] I agree with the view taken by Unterhalter J.

[23] The passage in *Townsend* itself invokes the earlier authority of *Morsner v Len*[4] for the proposition that the function of s 29D of the 1973 Companies Act is to acknowledge that there are two distinct juristic entities and that precisely because of that material difference between a CC and company, statutory intervention was necessary to provide 'continuity'.

[24] However, in my view, read correctly, *Morsner* does not support what is stated in *Townsend* nor does it support the appellant's case. The *causus belli* in *Morsner* was the proper meaning of a clause in an agreement of sale of an interest in a CC. Control of the CC was transferred before full payment had been made. The seller had cancelled the agreement alleging a breach of its clause 10, which provides:

'Die partye plaas op rekord dat die koper nie die reg sal hê om sy belang in die beslote korporasie, wat hiermee verkoop word, te vervreem of te verpand of te sedeer of op enige ander wyse daarvan ontslae te raak tensy die verkoper skriftelik toestemming daartoe gee of tensy hy die verkoper uitbetaal, welke toestemming in geen geval onredelik weerhou sal word nie.'[5]

[25] What was the breach? The buyer converted the CC into a company without the seller's consent and gave 49 per cent of the shares to a stranger.

4 *Morsner v Len* 1992 (3) SA 626 (A); [1992] 2 All SA 57 (A).

5 In translation 'The parties place on record that the purchaser shall not have the right to alienate or to pledge or to cede or in any other way to dispose of his interest in the close corporation which is hereby sold, unless the seller gives written permission thereto or unless the [the purchaser] pays out the seller, which permission shall in no circumstances be unreasonably withheld.' (My translation.)

[26] The Court held this conduct did breach clause 10, whose function, it was held, was to preserve the *merx* (i.e. the member's interest in the CC) until full payment was made. In addressing this controversy, at 631A-I, the Court also described the legislative scheme of the Close Corporations Act. It held thus:

'Die Wet op Beslote Korporasies 69 van 1984 het 'n nuwe soort regspersoon daargestel. Die doelstelling was om 'n eenvoudiger en goedkoper ondernemingsentiteit in die lewe te roep. Daardeur sou klein besighede die voordele van regspersoonlikheid kon geniet sonder dat hulle aan die ingewikkelde voorskrifte van die Maatskappywet 61 van 1973 hoef te voldoen. Sekere kenmerke is tipies van en eie aan 'n beslote korporasie. Om maar net enkeles te noem. Minimale formaliteit geld vir die administrasie en bedryf van 'n beslote korporasie. Soos wel bekend, word aandele nie uitgereik en geen aandeelkapitaal vereis nie. Alle lede het gelyke seggenskap in die bestuur en geen voorsiening vir die aanstelling van direkteure word gemaak nie. Die rekenkundige- en openbaarmakingsverpligtinge is in die geval van 'n beslote korporasie minder omvangryk.

Die betekenis en omvang van klousule 10 moet aan die hand van die appellant se optrede, en teen die agtergrond van hierdie kenmerkende verskille, bepaal word. Die bewoording van hierdie bepaling kon nouliks meer omvattend gewees het. Die sinsnede 'ontslae te raak' behels enige handeling waardeur die beheer en besit van die koopsaak permanent ontneem word: vanselfsprekend sluit dit dan die tot niet maak daarvan ook in. Die oogmerk was heel duidelik om die *merx* te bewaar - deur *inter alia* ontdoening daarvan te belet - totdat die prys betaal is.

Vir die stelling dat die omskepping van die beslote korporasie in 'n maatskappy nie deur klousule 10 verbied word nie, het die appellant op arts 29C(1) and 29D(1) van die Maatskappywet gesteun. Eersgenoemde artikel maak voorsiening vir sodanige omskepping. Artikel 29D(1) aldus die betoog, dui aan dat so 'n omskepping nie van wesenlike belang is nie en dat so 'n vervorming dus nie deur die verbod in klousule 10 getref word nie. Maar hulle is eerder bewys tot die teendeel. Juis omdat 'n ander soort regspersoon (met die onderskeidende kenmerke waarop reeds gewys is) in die lewe geroep is, was dit nodig ter wille van kontinuïteit om die bepalings van art 29D(1) tot die Maatskappywet by te voeg.

Daar kan dus met sekerheid gesê word dat die omskepping van die beslote korporasie in 'n maatskappy sonder toestemming (of betaling van die koopprys) deur klousule 10 belet word.'[6]

6 In translation: 'The Close Corporations Act 69 of 1984 established a new type of juristic person. The objective was

[27] Can these dicta support the conclusion in *Townsend?* In my view, they cannot. Much of what that Court stated about a CC being a new sort of legal persona was related to the uncontroversial fact that the legislation intended two materially distinctive types of juristic entity to exist. However, that does not support a conclusion that upon conversion, a new persona is conceived. The reason why the court was at pains to describe the different characteristics of a CC and a company was to demonstrate that the alienation of the interest in the CC that had been sold extinguished the *merx* and replaced it with a shareholding unlinked to the seller; plainly, an act which was incompatible with the terms of clause 10 of their agreement. In *Townsend*, the reading of *Morsner* was incorrect.

[28] In argument on appeal, in addition to the unhelpful reliance on *Townsend* and the misreading of *Morsner,* the decision in *Brodsky Trading 224 CC v Cronimet Chrome Mining SA (Pty) Ltd and Others* [2016] ZASCA 175; 2017 (4) SA 610 (SCA) was offered as a precedent for the appellant's key contention. However, that contention, too, is misplaced.

[29] The controversy in *Brodsky* was whether the business had complied with the Estate Agency Affairs Act 112 of 1976 to have a valid current fidelity certificate entitling it to trade. Section 26 of that statute forbade trading by any person without a valid certificate:

to create a simpler and cheaper business entity. By such means, small businesses could enjoy the advantages of juristic personality without them having to comply with the complex requirements of the Companies Act 61 of 1973. Certain features are typical of and exclusive to a close corporation. To name just a few. Minimal formalities apply to the administration and operation of a close corporation. As is well known, no shares are issued, and no share capital is required. All members have equal say in the management and no provision is made for the appointment of directors. The accounting and disclosure obligations in the case of a close corporation are less extensive.

The meaning and scope of clause 10 should be determined by the appellant's conduct and against the background of these distinguishing characteristics. The wording of these provisions could hardly have been more comprehensive. The phrase 'dispose of' encompasses any transaction by which the control and possession of the merx can be permanently alienated: self-evidently, it also includes the extinguishing thereof. The purpose was entirely clear to preserve the *merx* - by inter alia forbidding the extinction thereof - until the price was paid.

For the proposition that the conversion of the close corporation into a company is not prohibited by clause 10, the appellant placed reliance on section 29C(1) and 29D(1) of the Companies Act. The first mentioned section provides for such conversion. Section 29D(1).

So ran the argument, indicates that such a conversion is not of material importance and that such a transformation is not impacted by the prohibition in clause 10. But rather, it is proof to the contrary. Precisely because another type of

‘**26. Prohibition of rendering of services as estate agent in certain circumstances**
juristic person (with the distinguishing features already referred to) was brought into being, it was necessary in the interests of continuity to include the provisions of section 29D(1) to the Companies Act.
It can thus be said with certainty that the transformation of the close corporation into a company without permission (or payment of the purchase price) is prohibited by clause 10.’ (My translation.)
No person shall perform any act as an estate agent unless a valid fidelity fund certificate has been issued to him or her and to every person employed by him or her as an estate agent and, if such person is -

(a) a company, to every director of that company; or

(b) a close corporation, to every member referred to in paragraph *(b)* of the definition of “estate agent” of the corporation.'

[30] The relevant facts in *Brodsky* were that although a certificate had been issued for 2005 to the company, when the conversion to a CC took place in March 2006, no certificate was issued by the Estate Agency Board for 2006, and in 2007 a certificate was issued in the name of the company and its directors despite the fact that the company had already been converted to a CC, the result of which was that no certificate had been issued in the name of the CC or in the names of its members.

[31] The object of the analysis conducted by the Court in *Brodsky* was, therefore, to address the application of the provisions of the Estate Agency Affairs Act. The litigation had been triggered when an estate agency business located in a CC had been sold. The sale was repudiated and cancelled on the basis that the *merx,* i.e. the business, could not lawfully trade as an estate agency because it had not been issued with a certificate by the Estate Agency Board to entitle it to do so. The defence proffered was that a certificate had been issued but, in error, the certificate was applied for at a time when the company had converted to a CC but the form of application was styled a company, its former guise and the certificate obtained misdescribed it.

[32] It was held that this did not overcome the peremptory requirements of the Estate Agency Affairs Act. The Court stated that the ‘company did not exist' and a certificate in the company’s name was null and void. These remarks must be

understood in that context, i.e. the effect of the provisions of the Estate Agency Affairs Act. The Court, at paras 20 to 22 stated as follows (all allusions therein to 'the Act' are references to the Estate Agency Affairs Act):

'[20] Section 16(4) provides that no certificate shall be issued unless and until the provisions of the Act are complied with. As from the date of conversion, being 20 March 2006, the company no longer existed. When the application was made for a renewal of the certificates in 2007, it must have been made in the name of the company, because Mr Maree conceded that he had not told the Board of the conversion. The application was accordingly made by a nonexistent company, Brodsky Trading 224 (Pty) Ltd, which no longer qualified as an "estate agent" in terms of the Act. The certificate therefore purported to certify compliance with the requirements of the Act by a nonexistent company, in the guise of an "estate agent".

[21] Section 16(4) of the Act provides that any certificate issued in contravention of the Act shall be invalid. The issue of the certificate to the nonexistent company was accordingly invalid. In addition, the issue of a certificate to Mr Maree in his capacity as a director of the non-existent company, and not in his capacity as a member of the appellant, did not comply with s 16 of the Act and was also invalid. In terms of s 26 of the Act, every director of a company and every member of a close corporation, is required to have a valid certificate. In their absence the company or close corporation concerned is not entitled to receive any remuneration in terms of s 34A of the Act. On this additional ground the appellant is precluded from recovering any remuneration.

[22] This is not simply an issue of nomenclature, or a misdescription in the name of the certificate holder, but one of substance. The objectives of the Act are not fulfilled by the issue of invalid certificates by the Board as they play a central role in ensuring that estate agents comply with its provisions. There was accordingly no basis for the court a quo to conclude that the appellant had substantially complied with its requirements.'

[33] The problem presented in this matter is quite different. In addition to the traverse of the common cause facts set out above, it must be noted that important information to explain why the resolution and the suretyship alluded to the CC when the persons responsible for creating the documents knew full well that the CC had been converted into a company were not put on record. Indeed, it is plain that

the rationale for that conduct has been deliberately obscured. That is apparent in two respects.

[34] In seeking rescission, Mr Maseko, who could have explained all, refrained from telling the court anything useful. First, he omitted to disclose that he had personally met the sheriff when the initial writ was presented in 2014 and chose to assert that the first the appellant *knew* of the judgment was in 2018. This statement is a dissembling sleight of hand. The appellant's counsel, in a valiant effort to guard his honour, was driven to contend that although Mr Maseko knew the appellant company did not know, because as at the time, Mr Maseko was not acting for the company when he engaged the sheriff. This simply cannot be cogent.

[35] Similarly, in the second respect, Mr Maseko denied the authority of Mr Motha to sign the suretyship of behalf of the company and omitted to disclose the resolution which alludes to both the CC and the company interchangeably. These facts were only put on record in the answering affidavit to rebut the denial of knowledge of the order and the denial of authority to conclude the suretyship set out in the founding affidavit. In reply, despite an opportunity to explain, these revelations were ignored.

[36] Therefore, bereft of a proper account of what happened, an explanation for why the appellant's directors acted as they did on 23 October 2007 must be inferred from the known facts. The most generous interpretation of the facts suggests that the directors of the company, Mr Maseko and the others, were slack in their paperwork and either they, or an unenlightened staff member, drew the documents which they then signed without due care to precision of thought or of word. Thus, the upshot is that they made a mistake. Their mistake does not matter much because the statutes make provision for an absolute absence of any hiatus or interruption of juristic personality upon conversions one way or the other.

[37] The emphasis in argument on behalf of the appellant on the form of the

corporate identity as having the effect of immunising a particular juristic person from accountability for its acts, when erroneously draping itself with the mantle of its former corporate guise, is wholly unmeritorious. There can be only one, and whichever cloak is donned, the person within remains extant. The singularity of identity is nowhere more trenchantly stamped on the appellant, despite its several incarnations, than by the fact that the tax number and the VAT number of the business remained unchanged throughout all these years, a fact usefully put on record by the appellant itself when it attached the CIPRO records of the corporate changes. Moreover, the P O Box address remained the same. The physical address too, remained '35 Botha Avenue' save for a rather odd change, perhaps more apparent than real, when in 2006, it was briefly '35 President Street', but without a change of postcode.

Conclusions

[38] Accordingly,

(1) The juristic persona remains the same regardless of the corporate form upon conversion from CC to company or vice versa.

(2) An incorrect description of the juristic persona is not a ground to compromise a contract concluded between it and another person.

(3) The suretyship is valid and enforceable.

[39] The contention that the order a quo had been in error, within the contemplation of rule 42(1)(a) of the Uniform Rules of Court, on the grounds that the 'defendant' did not exist, axiomatically evaporates.

[40] The attempt to bring a case within the bounds of rule 31(2)(b) on the grounds that the appellant learnt of the judgment after the fact, is scuttled by two issues. First, the application is out of time because the Appellant's director, Mr Maseko had knowledge of the order in November 2014, not only in 2018 upon the effective service of the writ of execution. It must follow that the appellant too had knowledge

at that time in 2014 because to suggest a director could have knowledge in a 'private capacity' and the company did not thereby become aware is an unsustainable contention. Second, even ignoring that quibble, the appellant's defence of not being bound by the suretyship fails, as addressed above.

[41] The service of the summons on the domicilium stipulated in the suretyship is not denied. Service was, therefore, effective.

[42] No reason exists to rescind the order.

The Order

[43] The appeal is dismissed with costs.

ROLAND SUTHERLAND
ACTING JUDGE OF APPEAL

Appearances:

For appellant:	G F Heyns SC
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	Phatshoane Henney Attorneys, Bloemfontein
For respondent:	C J Bresler
Instructed by:	Bouwer & Olivier Incorporated, Randburg
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