IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE

Case no: 175/04

In the matter between

C J MARITZ **FIRST APPELLANT**

C W C PIETERSE **SECOND**

APPELLANT

and

MARITZ & PIETERSE INCORPORATED **RESPONDENT**

Coram: **SCOTT, ZULMAN, NAVSA, NUGENT and HEHER JJA**

Heard: **23 MAY 2005**

Delivered: **30 MAY 2005**

Summary: Attorneys Act 53 of 1979 s 23(1)(a) – liability of former directors of company to its liquidators for claims of creditors in the estate – *locus standi* of liquidators to sue the directors.

JUDGMENT

HEHER JA

HEHER JA:

[1] This appeal concerns the right of liquidators of a professional company to rely on the statutory liability of its former directors as joint and several co-debtors with the company to its creditors as a ground for claiming from those directors the amounts of claims proved by such creditors in the liquidation of the company.

[2] Maritz & Pieterse Incorporated conducted the practice of an attorney in Pretoria. As the name indicates it was a juristic person, incorporated and registered under the Companies Act 61 of 1973 and empowered to carry on its professional practice by reason of s 23(1) of the Attorneys Act 53 of 1979. (I refer to it hereinafter as 'the company'.)

[3] The last-mentioned section permits a company to conduct the practice of an attorney only if

'(a) . . . its memorandum of association provides that all present and past directors of the company shall be liable jointly and severally with the company for the debts and liabilities of the company contracted during their periods of office.'

The memorandum of the company contained the necessary provision.

[4] At all material times the only directors of the company were Christoffel Johann Maritz and Carl Wilhelmus Cornelius Pieterse. On 20 September 2001 it was placed under a provisional winding up order by De Vos J and the liquidation was made final (notwithstanding the opposition of the directors) by an order of Moseneke J on the grounds that it was just and equitable so to do. The learned Judge found that the directors had permitted the company to become a vehicle for the operation of a pyramid scheme during which some R12 million of investors' funds were channeled through its trust account into the grasp of the operator of the scheme, one Small, who made away with the proceeds. By releasing the funds in the trust account without ensuring that adequate securities were provided the company acted in breach of its mandate from the investors to act as paymaster for the scheme. The company thereby incurred contractual claims for the losses suffered by the investors.

[5] After the granting of the final order the Law Society of the Northern Provinces brought an application to strike the directors off the roll of attorneys. The application was granted by Mynhardt and De Vos JJ. The role of the directors in the scheme was merely one of several reasons which led the court to conclude that they were unfit to practice.

[6] Certain of the investors in the scheme duly proved claims in the estate of the company: Mr Kyle for R500 000, Mr van Zyl for R500 000 and Mr Nothnagel for R300 000 being the respective amounts of their cash

investments which had been released to Small. (It was argued before us that these were illiquid claims for damages, but it seems obvious that they were fixed or readily ascertainable losses and were proved as liquidated claims.)

[7] In May 2003 the joint liquidators of the company launched an application against the former directors in which they claimed the following relief:

'1. Dat verklaar word dat Christoffel Johann Maritz en Carl Wilhelmus Cornelius Pieterse persoonlik aanspreeklik is vir al die kontraktuele skulde van Maritz & Pieterse Ing. (In Likwidasie);

2. Dat vonnis ten gunste van die Applikant teen Christoffel Johann Maritz en Carl Wilhelmus Cornelius Pieterse toegestaan word vir die kapitale bedrag van R1300 000.00 tesame met rente op die vermelde kapitale bedrag bereken teen 'n koers van 15.5% per jaar van 20 September 2001 tot datum van betaling;

3. Dat die Griffier van hierdie Agbare Hof gemagtig word om 'n lasbrief uit te reik ten gunste van die Applikant teen die twee direkteure van die Applikant . . . vir die kapitale bedrag van R1300 000.00 tesame met rente op die vermelde kapitale bedrag bereken teen 'n koers van 15.5% per jaar vanaf 20 September 2001 tot datum van betaling;

4. Dat die Griffier van hierdie Agbare Hof gemagtig word om verdere lasbriewe uit te reik ten gunste van die Applikant ten die vermelde twee direkteure van die Applikant . . . by die voorlegging van 'n eedsverklaring van die Applikant se likwidateur, Andries Petrus Jacobus Els, waarin beweer word wat die bedrag is

waarvoor die lasbrief uitgereik moet word en waarin beweer moet word dat sodanige bedrag 'n kontraktuele verpligting van Maritz & Pieterse Ing. (In Likwidasie) is;

5. Dat die koste vn hierdie aansoek koste sal wees in die likwidasie van Maritz & Pieterse Ing. (In Likwidasie).'

[8] The essence of the application was that the liquidators sought to recover from the former directors the amount of claims proved and to be proved in the estate by the creditors of the pyramid scheme. The basis for the case as set out in the founding affidavit was the proof of claims previously referred to, the findings of Moseneke J in the liquidation proceedings that the investors were contractual creditors of the company and the provisions of s 23(1)(a) of the Attorneys Act quoted above as incorporated in the company's memorandum of association. Maritz and Pieterse opposed the application (save for conceding prayer 1). They took issue with the *locus standi* of the liquidators and also raised various defences going to the merits of the application.

[9] The matter came before Hartzenberg J. On 7 October 2003 he granted the relief claimed in paragraphs 1, 2 and 3 of the notice of motion, granted leave to the liquidators to apply on the same papers, suitably supplemented, for further judgments against the company in liquidation (the learned Judge probably intended to refer to the former directors) and for authorization of writs of execution thereon, and ordered Maritz and Pieterse

to pay the costs of the application. An application for leave to appeal was refused by the court *a quo* but granted by this Court.

[10] Because of the view that I take on the question of the standing of the liquidators to rely on the provisions of s 23(1) as incorporated in the company's memorandum it will be unnecessary to refer to the defences to the merits. On the question of *locus standi* Hartzenberg J said:

'The attack against the *locus standi* of the applicants is as I understand the argument, based upon the fact that in section 424 of the Companies Act specific authority is given to the liquidator to institute an action against the former directors, whereas neither section 53(b) of the Companies Act nor section 23 of the Attorneys Act specifically empowers a liquidator to institute action against the directors. The argument is that it is for the creditors to institute the action. It completely overlooks the provisions of section 73(1) of the Insolvency Act No. 24 of 1936 which specifically empowers a trustee to obtain legal advice and to institute action on behalf of the estate, with the authorization of the Master or the creditors. In this case the argument is not that the applicants did not obtain the necessary consent but it is that the applicants may not institute an action at all and may not do so, even with the consent of creditors. There is not a specific provision which entitles a trustee to institute action for, for example the recovery of a debt from a debtor of the insolvent estate. I do not believe that there can be any question that a trustee is entitled to institute such an action for the benefit of the creditors. In my view that argument is intenable and cannot be sustained.'

[11] I would respectfully suggest that the learned Judge has lost sight of the real issue. A liquidator is appointed for the purpose of conducting the

proceedings in a winding-up of the company (s 367 of the Companies Act) with the duty to recover and realise the assets and property of the company for the benefit of its creditors. See generally *Ferreira v Levin NO and Others*; *Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC) at paras [122] to [123]; *Bernstein and Others v Bester and Others NNO* 1996 (2) SA 751 (CC) at para [15]. The personal assets of the former directors do not belong to the company in liquidation. The liquidators' case can only be that s 23(1) read with the memorandum creates an asset of the company in the form of a claim against those directors. If such a claim does not arise then there is nothing which can be the subject of the relief claimed in prayers 2, 3, and 4 of the Notice of Motion and the liquidators acted beyond their powers in attempting to recover from the directors on that basis. In this sense they will have no *locus standi*.

[12] The question requires consideration of the breadth of liability that flows from due compliance with the relevant provision of s 23(1) of the Attorneys Act.

[13] The history of s 53(b) of the Companies Act and its application to professional companies was investigated and explained in *Fundstrust (Pty) Ltd (in liquidation) v Van Deventer* 1997 (1) SA 710 (A) at 728B-731B. Although the main point decided in that case was that the liabilities which are referred to in s 53(b) are limited to debts arising in contract, the plain words of the section make it clear that the protection provided by the

section was directed at the company's creditors and this purpose was recognized in the judgment (at 730B, 731G-H). The company cannot be its own creditor and there is nothing derivable from the wording or the ostensible purpose of the provision to suggest that it was intended to provide benefits which the company itself could claim. The effect of the section is to render the directors co-debtors with the company, conferring on the creditors an independent right of action against the directors. I agree with H J Erasmus J who said in *Sonnenberg McLoughlin Inc v Spiro* 2004 (1) SA 90 (C) at 97E that the effect of including the statement in the memorandum is twofold: creditors are able to hold the directors liable *singuli et in solidum* for company debts and liabilities, and if a director pays any of the company debts he has a right of recourse against his fellow directors for their proportionate shares. It is unnecessary to decide whether Erasmus J was correct in finding (at 97F) that the section does not provide a right of recourse to a company against its directors where the company has paid its debts, because no such averment has been made by the liquidators. Their case is simply reliance on the direct rights that flow from the section. They have not tried to set up a right of recourse by one co-debtor against another. If they had done, they might have stumbled over both the proper interpretation of the relationship which the statute creates between the company and its directors and the absence of payment by the company; cf *Koornklip Beleggings (Edms) Bpk v Allied Minerals Ltd* 1970 (1) SA 674

(C) at 677C-F.

[14] To interpret s 23(1)(a) as the liquidators would have it, would, as this case shows, often bring about consequences directly opposed to the legislative intention. If the company in liquidation were permitted to recover its indebtedness to the creditors from its former directors and were to be paid in full the proceeds would necessarily accrue to the general body of creditors, entitling the individual creditors to a dividend at best since the directors cannot be mulcted twice. The creditors of a professional company would be deprived of the very assurance that the section sets out to provide which is the right to claim in full from the directors.

[15] For these reasons I conclude that the liquidators derived no rights from section 23(1)(a) or the memorandum of the company and the learned Judge was wrong in granting the relief which they claimed. Even the declaratory order made pursuant to paragraph 1 of the notice of motion was in consequence academic.

[16] The appeal is upheld with costs. The order of the court *a quo* is set aside and replaced by the following:

'The application is dismissed with costs'.

_____

J A HEHER
JUDGE OF APPEAL

Concur
SCOTT JA
ZULMAN JA
NAVSA JA
NUGENT JA