THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case No: 414/10

In the matter between:

UKWANDA LEISURE HOLDINGS (PTY) LTD **Appellant**

and

STREET SPIRIT TRADING 92 (PTY) LTD **Respondent**

Neutral citation: *Ukwanda Leisure Holdings v Street Spirit Trading* (414/10) [2011] ZASCA 90 (30 May 2011)

Coram: CLOETE, HEHER, MAYA, SNYDERS JJA and PETSE AJA

Heard: 11 May 2011

Delivered: 30 May 2011

Updated:

Summary: Company – liquidation – application for – *locus standi* – 'member' – what must be alleged and proved; 'creditor' – applicant relying on tacit term of shareholders' agreement – not proved to be necessary to conclusion of the agreement.

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ORDER

On appeal from: North Gauteng High Court (Pretoria) (Ranchod AJ sitting as court of first instance):

The appeal consequently succeeds. The following order is made:

1. The appeal is upheld with costs.

2. The order of the court a quo is set aside and replaced with an order in the following terms:

'The application is dismissed with costs.'

JUDGMENT

HEHER JA (CLOETE, MAYA, SNYDERS JJA AND PETSE AJA concurring):

[1] The respondent, Street Spirit Trading 92 (Pty) Ltd, applied to the North Gauteng High Court for the winding-up of the appellant, Ukwanda Leisure Holdings (Pty) Ltd, on the ground that that company was unable to pay its debts,[1] or, in the alternative, that it was just and equitable that it should be wound up.[2] In both instances Street Spirit relied on its alleged status as a creditor of the company.[3] In this Court its counsel submitted that it was also a member for the purposes of relying on the just and equitable ground.

[2] The learned judge (Ranchod J), who heard the application, found that the applicant had established that it was indeed a creditor. He held that Ukwanda was indebted to it in respect of the repayment of a loan of R3.5 million and that the company was unable to pay its debts. He also concluded that shortage of capital meant that the

[1] Section 344(f) of the Companies Act 61 of 1973.
[2] Section 344(h).
[3] Section 346(1)(b).

respondent was unable to achieve its stated objective of developing leisure properties and resorts and that justice and equity required its winding-up. He accordingly made an order placing Ukwanda under final winding-up. The appeal against that order is brought with leave of the court a quo.

[3] As Street Spirit's *locus standi* to bring the application as a creditor or member is in my view decisive of the appeal I shall deal first with those issues.

Was Street Spirit a creditor?

[4] It was common cause that its status as a creditor depended upon proof of the existence of a tacit term in a written agreement concluded on 21 November 2007 ('the shareholders' agreement'). The parties to the agreement were Street Spirit, Ukwanda, Before the Wind Investments 300 (Pty) Ltd and Blue Nightingale Trading 707 (Pty) Ltd. In the agreement Street Spirit was called 'Vuwa' and Before the Wind, 'Quattro', apparently with reference to their holding entities. The parties agreed to utilise a dormant company, Ukwanda, the main object of which would be to acquire and hold majority shares in leisure property developments and related assets as investments. Of an authorised share capital of R1000 divided into 1000 shares of R1 the initial shareholders, Street Spirit, Before the Wind and Nightingale, would each be issued with 150 shares.

[5] The finances of Ukwanda were addressed in clause 5 of the agreement which provided:

'5.1 The board shall from time to time determine the amount of funding necessary in order to allow the company to conduct, promote and expand the business successfully.

5.2 It is recorded that the initial shareholders have, prior to the entering into of this agreement formed an alliance ("the alliance") to seek funds for the business of the Company from outside sources but-

5.2.1 It is recorded that Vuwa has been issued shares subject to it making a loan to the company in an amount of R6 000 000 (six million rands) ("Vuwa loan").

5.2.1.1 Vuwa will make the loan contemplated in 5.2.1 to the Company by way of 24 (twenty four) equal monthly instalments in an amount of R250 000 (two hundred and fifty thousand rands) into the trust account of Veneziano Incorporated, Standard Bank Castle Walk, Account number: 411373749 or such other bank account as nominated by the Board to Vuwa in writing;

5.2.1.2 The first instalment of the monies due as contemplated in clause 5.2.1.1 will be paid upon

signature of this agreement. The second instalment will be due and payable on the last business day of the month during which the first instalment was made. All subsequent instalments will be due and payable on the last business day of the month following the date upon which the previous payment had become due and payable.

. . .

5.2.4 The Vuwa loan (or any part thereof) will only be repayable to Vuwa, subject to 5.2.7 and only after the lapse of the 24 (twenty four) month period contemplated in 5.2.6.

5.2.5 Vuwa will, through its alliance with various Financial Institutions procure finance to the Company and any of its subsidiaries and or any company under the Control of the Company upon the terms and conditions acceptable to the entity to whom the finance is granted and;

5.2.6 the total of the finance to be procured by Vuwa as contemplated in 5.2.5 is to be concluded over a period of 24 (twenty four) months calculated from the effective date and subject thereto that the Company present projects to the prospective financier of which the profit forecasts contained in the feasibility studies conducted by appropriate professionals are deemed acceptable to the financiers. The amount so procured by Vuwa will not be less than an additional R200 000 000 (two hundred million rand). It will be deemed that the finance has been procured upon the conclusion of a final and binding written agreement between the financial institution and the lending entity pertaining to the finance so procured and;

5.2.7 In the event of the total of the finance is procured by Vuwa as contemplated in 5.2.5 during the period contemplated in 5.2.6 not equalling the amount as set out in clause 5.2.6 then in that event Vuwa irrevocably agrees that the monies loaned to the Company as contemplated in 5.2.1 and 5.2.2 be written off and or donated to the Company.'

[6] The agreement was effective from the date of signature.

[7] In accordance with its loan obligation Street Spirit paid fourteen instalments of R250 000 each from November 2007 to December 2008. Thereafter it ceased to make such payments. By the time Ukwanda's answering affidavit was filed in January 2010 more than 24 months had passed since the conclusion of the agreement and it was common cause that Street Spirit had not procured finance for the company of not less than R200 million as contemplated in clause 5.2.6. The consequence of clause 5.2.7 would, absent a legal basis to nullify its effect, have been that the Vuwa loan would have been written off and Street Spirit would have ceased to be a creditor of Ukwanda.

[8] However, in its founding affidavit in the application, Street Spirit set up the existence of a tacit term in the shareholders' agreement which, if proved, would both avoid the operation of clause 5.2.7 and entitle it to recover the amount of the loan totalling R3.5 million from Ukwanda, thus rendering it a creditor of the company at the time it launched its application.

[9] The factual basis for the implication of the tacit term, as it appears from the founding affidavit was, in summary, the following:

1. Clause 5.2 of the agreement recorded that the shareholders had before entering into it, formed an alliance to seek funds for the business of the appellant from outside sources.
2. At a time when the Vuwa loan was being negotiated one De Beer on behalf of Jansk International Ltd undertook that by the end of April 2008 Ukwanda would take transfer of shares amounting to 15 per cent of the ordinary issued share capital of Acc-Ross Holdings Ltd and derivative instruments equating to 45 per cent of that share capital.
3. Because Acc-Ross was well-established in the sphere of business in which Ukwanda was to operate, the acquisition of the Acc-Ross interest would be to the advantage of the appellant in the market 'to realise its strategic objectives'.
4. The acquisition of the Acc-Ross interest was to be financed by Jansk taking up shares in Ukwanda at par value and the crediting of the value of the Acc-Ross investment to its loan account as a shareholder of Ukwanda. Jansk formed a Cyprus-registered company, Sedimo Investments Ltd, for the purpose of subscribing for Ukwanda's shares. The parties agreed that Sedimo's shareholding would equate to 55 per cent of the issued share capital of Ukwanda.
5. The transaction described in the preceding subparagraphs was referred to in clause 8.1.1 of the shareholders' agreement:

'8.1 Subject to the remaining provisions of this agreement, notwithstanding anything to the contrary contained in the memorandum and/or articles of association of the company for the time being, unless otherwise agreed by the Shareholders, a shareholder ("selling shareholder") shall not::

8.1.1 save for any contemplated subscription of the unissued shares of the company comprising a total of 55% (fifty five percentum) of the total authorized shares of the Company by a shareholder to be introduced by de Beer, no shareholder shall during the restricted period pledge, cede or

otherwise encumber and or sell any of its shares; and . . . .'

Likewise, the transaction was referred to in a letter given to the appellant by Jansk simultaneously with the signature of the shareholders' agreement. The letter, addressed by De Beer as 'the authorised representative' of Jansk, to the appellant, is dated 21 November 2007 and was also annexed to the shareholders' agreement. It reads as follows:

'This document replaces the letter dated 12 September 2007, in reference to the same content.

We wish to confirm that all positions regarding the mark-to-market movements on derivative instruments, proposed for transfer to Ukwanda Leisure Holdings (Pty) Ltd (subject to successful conclusion of negotiations and any required regulatory approvals), will be retained and funded by Jansk International Limited.

We further wish to confirm the proposed transfer (subject to the conclusion of successful negotiations and any required regulatory approvals) to Ukwanda of unencumbered physical shares amounting to 15% of the issued ordinary share capital of Acc-Ross Holdings Limited and unencumbered derivative instruments equating to control over a further 45% of the issued ordinary share capital of Acc-Ross Holdings, i.e. the agreement will only become effective immediately following such transfer.

We endeavour to complete the proposed agreements for the transfers as referred to above by the end of April 2008.

We trust that you find this in order.'

The deponent to Street Spirit's founding affidavit described this letter as 'confirming the proposed transfer' of 15 per cent of the ordinary shares of Acc-Ross and derivative instruments equating to a further 45 per cent of its issued share capital. De Beer, stated the deponent, 'wore numerous hats' in the transaction, being an authorised director of both Sedimo and Jansk, a trustee of the Quattro Trust and a shareholder of Acc-Ross, and the implementation of the scheme was within his control.

6. Furthermore, on 21 August 2007, ie three months before the Vuwa investment, the Quattro Trust granted a written call option to Ukwanda to purchase 139 785 717 shares in Acc-Ross at R0.53 per share to be exercised eight months after signature. The call option agreement was attached to the shareholders' agreement as, in the words of Street Spirit's deponent, 'proof of the aforegoing scheme'.

[10] The tacit term was formulated by Street Spirit as follows:

'That the aforesaid transaction [the transfer to Ukwanda of 15 per cent of the ordinary issued share

capital of Acc-Ross Holdings Ltd and derivative instruments equating to 45 per cent of the share capital of that company] would be effected and that should it not be, . . . [Street Spirit] would be entitled to resile from the shareholders' agreement and claim immediate repayment of the money loaned to [Ukwanda].'

[11] Street Spirit alleged that Ukwanda had breached the agreement to acquire the Acc-Ross interests, and that it had duly terminated the shareholders' agreement and claimed repayment of R3.5 as *restitutio in integrum* as it was entitled to do. Despite the opening words of clause 5.2.1, Street Spirit did not allege that it had tendered return of the shares issued to it but in fact relied on such issue in support of its status as a member of the company.

[12] Street Spirit also averred in the application that the Vuwa loan (investment) had been made on condition that the Acc-Ross transaction took place and on the false representation that it would do so. It was thus induced into making the loan to Ukwanda. This case does not appear to have been advanced before the court a quo and was not relied on by counsel for Street Spirit before us, perhaps with good reason, given the existence of 'whole contract' and 'no representations' clauses in the shareholders' agreement.

[13] The case as presented in the founding affidavit went on to aver that, by reason of the failure to transfer the Acc-Ross investment to Ukwanda, Ukwanda was hamstrung in its efforts to raise the finance it needed to operate (beyond the moneys loaned by Street Spirit). By December 2008 it had became clear to Street Spirit that Ukwanda would be unable to realise its objectives because of its inability to raise finance 'which was aggravated by Sedimo's failure to procure the transfer of the Acc-Ross Investment to the appellant'.

[14] Ukwanda, in its answering affidavit, admitted the conclusion and terms of the shareholders' agreement and the terms of the Jansk letter of the same date and the call option attached to the agreement. That aside, it denied the substance of nearly all other averments, inferences and interpretations relied on by Street Spirit. It also denied the existence of the tacit term set up by the applicant.

[15] The learned judge did not find that Ukwanda's denial could be dismissed as mala fide or plainly lacking in credibility or substance. He summarised the applicant's averments, much as I have done, without analysis, did not refer to Ukwanda's response and concluded:

'Given all the above facts I am of the view that it was indeed a tacit term of 'the shareholders' agreement] that the Acc-Ross transaction would take place. Otherwise it would not make business sense in the circumstances for the applicant to agree to lend the respondent R6 000 000 and undertake to obtain additional loans totalling R200 000 000 for the respondent.'

[16] I am by no means sure that the alleged tacit provision was a 'term' at all. It seems by its formulation to have been more akin to a resolutive condition. See *Venter Agentskappe (Edms) Bpk v De Sousa* 1990 (3) SA 111 (A) at 111B-G. Moreover, the 'undertaking' to transfer the Acc-Ross interest seems to have depended on further agreement between Ukwanda and Jansk and was not something which could be enforced against Ukwanda by Street Spirit.

[17] Assuming however that Street Spirit was correct in its identification of a 'tacit term', I do not think it discharged the onus of proving that the term as formulated was necessary to the conclusion of the agreement.[4] The evidence, even without regard for the denials, goes no further than establishing that acquisition of the Acc-Ross interest would have been to the advantage of Ukwanda. Nor was Street Spirit able to establish the centrality of the Acc-Ross transaction to the conclusion of the agreement or its undertaking to lend money to the company or to procure finance for it. In my view the appellant failed to show any material connection between implementation of the Acc-Ross transaction and its decision to lend money to Ukwanda or between that transaction and its undertaking to procure loan finance for Ukwanda. In the last-mentioned regard the reference in the affidavit to the 'hamstringing' of the company's ability to raise finance is an ex post facto deduction and Street Spirit does not allege that such a threat was present to the minds of the parties before or at the signing of the agreement. It is common occurrence that contracting parties are disappointed in their expectations. That however does not justify amendment of their

[4] *Wilkins NO v Voges* 1994 (3) SA 190 (A) at 136I-J.

juristic acts by the court.[5]

[18] Counsel for Street Spirit submitted that the agreement between the shareholders is to be found not only in the contract between but also in the annexures to the contract (the letter of 21 November 2007 from Jansk and the call option). So construed, he argued, the materiality of the transfer of the Acc-Ross interest is manifest, since the letter states that 'the agreement will only become effective immediately following such transfer' and 'agreement' must mean the shareholders' agreement.

[19] I am not persuaded that the submission is correct. First, although 'the/this agreement' is defined in clause 1.1.1 as 'the agreement as set out in this document together with the annexures attached thereto' that definition does not elevate the content of the annexures to the level of matters of agreement between the parties. Second, the letter does not refer to the shareholders' agreement at all. Logically, the 'agreement' which is only to become effective on transfer is the undertaking to fund which is provided in the preceding paragraph of the letter. Third, counsel's interpretation would give rise to an irreconcilable conflict between the contract and the letter since the former is expressly rendered effective on the date of signature (clause 1.1.13) while the letter would suspend the operation of the contract until transfer of the Acc-Ross interest. The whole tenor of the contract is opposed to such suspension, no obligations are prospectively phrased and no provision is made for the event of non-fulfilment of the predicated condition.

[20] The reliance on the alleged undertaking by De Beer in relation to the transfer of the shares and derivatives by the end of April 2008 is not borne out by the terms of the Jansk letter. In that letter De Beer uses the word 'proposed' in relation to the transfer. He qualifies the transfer as 'subject to the conclusion of successful negotiations and any required regulatory approvals' and he undertakes to 'endeavour to complete the proposed agreements for the transfers' by the end of April 2008, none of which, on the face of it suggests either unequivocal commitment to or final agreement in relation to the acquisition. Mr Barbas, deposing on behalf of Ukwanda, denied that an undertaking was given by Jansk and added that Jansk 'had set various conditions which are not addressed

[5] *Vander Merwe v Viljoen* 1953 (1) SA 60 (A) at 65G.

by [Street Spirit] and which have not been met'. Barbas emphasises in the answering affidavit that no definitive or final agreement had been reached in relation to the interest of Acc-Ross in Ukwanda or in the obtaining by the appellant of the instruments in Acc-Ross.

[21] Ukwanda denied that the call option agreement was entered into in anticipation of the subscription for a 55 per cent interest in it by Sedimo or that Sedimo did so subscribe. De Beer supported this denial with a confirmatory affidavit.

[22] With regard to clause 8.1.1 of the agreement, which, according to Street Spirit related specifically to the proposed take up of shares by Sedimo, Ukwanda denied any such connection. The wording of the clause appears to be carefully non-specific, suggesting an uncertain future event. To this extent it was inconsistent with implicit reliance by the parties on a certain and binding, albeit tacit, term that transfer of the Acc-Ross interests would take place on or before 28 April 2008 or at all.

[23] Ranchod AJ found further support for his view that a tacit term had been proved in a meeting of some of Ukwanda's shareholders that took place on 4 March 2009, 'where an oral agreement was reached for repayment of the loan'. The learned judge was seemingly unconscious that Ukwanda not only denied giving such an undertaking but that Barbas had explained why he would not have done so. Barbas deposed that:

'The meeting was not a shareholders' meeting nor a meeting of the directors of the respondent. I would not agree to repayment without shareholders' consent. Furthermore, the respondent received legal advice confirming that the respondent was not obliged to make repayment of the loan by virtue of the shareholders' agreement.'

[24] The learned judge rode roughshod over both denial and explanation. He said:

'In my view what is important here is that the Chief Executive Officer ('CEO') of the respondent, Mr Peter Barbas, undertook to repay the loans to the applicant. The day to day running of the company is vested in its board of directors and not the shareholders'.

[25] The court's approach was in conflict with the established rule in motion practice.[6] If the learned judge intended to be robust I think he was wrong: neither Mr Barbas's credibility nor his evidence should have been so superficially judged. Whether or not the

[6] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-I.

board had the final say on the question of repayment, the origin of the loan obligation lay in the shareholders' agreement and the importance of the obligation in the context of Ukwanda's business may very well have influenced Barbas's understanding of his duties. Moreover, if, as he deposed, Ukwanda had received advice that the loan was not repayable (an averment which could not be challenged on the papers) it is unlikely that he would have ignored the advice. It is not insignificant in the matter of probabilities around this issue that the unsigned minute of this 'discussion' annexed to Street Spirit's replying affidavit reflects attempts to settle the dispute and does not appear to bear out any unequivocal undertaking to repay the loan by Barbas. In addition, in the first letter written by Street Spirit's attorneys after 4 April in which its claim for payment is set out (on 8 April 2009) justification is founded in the tacit agreement but no mention is made of an undertaking to pay. The same shortcoming is repeated in the letters of demand from Street Spirit's attorneys on 11 May and 19 June 2009. It is thus clear that Ukwanda raised a real dispute of fact in relation to the so-called undertaking to pay.

[26] On a conspectus of all the relevant evidence, Street Spirit accordingly did not prove that it was entitled to rely on a tacit term which entitled it to resile from the shareholders' agreement and reclaim the moneys advanced to Ukwanda. The provisions of clause 5.2.7 were not disturbed and Street Spirit's assertion that it was a creditor of Ukwanda should not have been upheld in the court a quo.

Did Street Spirit prove that it was entitled to bring the application in terms of s 346(1)(c) of the Act?

[27] Section 346 of the Act provides:

'(1) An application to the court for the winding-up of a company may, subject to the provisions of this section, be made-

. . .

(c) by one or more of its members, or any person referred to in s 103(3), irrespective of whether his name has been entered in the register of members or not. . .

(2) A member of a company shall not be entitled to present an application for the winding-up of that company unless he has been registered as a member in the register of members for a period of at least six months immediately prior to the date of the application or the shares he holds have devolved upon him through the death of a former holder and unless the application is on the

grounds referred to in section 344(b), (c), (d), (e) or (h).

[28] Section 103 of the Act provides:

'(1) The subscribers of the memorandum of a company shall be deemed to have agreed to become members of a company upon its incorporation, and shall forthwith be entered as members in its register of members.

(2) Every other person who agrees to become a member of a company and whose name is entered in its register of members, shall be a member of the company.

(3) A company shall, subject to the provisions of its articles, enter in the register as a member, *nomine officii*, of the company, the name of any person who submits proof of his appointment as the executor, administrator, trustee, curator or guardian in respect of the estate of a deceased member of the company or of a member whose estate has been sequestrated or of a member who is otherwise under disability or as the liquidator of any body corporate in the course of being would up which is a member of the company, and any person whose name has been so entered in the register shall for the purposes of this Act be deemed to be a member of the company.

(4) Subject to the provisions of section 213 (1) *(b)*, the bearer of a share warrant may, if the articles of the company so provide, be deemed to be a member of the company within the meaning of this Act, either for all purposes or for such purposes as may be specified in the articles.'

[29] There is no question that ss (3) is not of application in this appeal.

[30] The onus, as is the case with any person who relies upon a provision in a statute for his power to act or right of action, lies upon the person who purports to exercise that power or assert that right. Applied to a case like the present, Ukwanda was, in the first instance, required to make clear that, in bringing the application it acted as a member. Having done so it needed to place evidence before the court which met the statutory requirements that justified its reliance, ie that its name was entered in the company's register as a member and had been so for at least six months prior to the application for liquidation.

[31] Street Spirit did not, in its founding affidavit, allege that it was a member. Nor did it expressly or impliedly rely on its status as such to bring the application. Street Spirit did allege that it subscribed for 150 ordinary par value shares during November 2007 and that it still held those shares twenty months later when the application was launched. In that sense Street Spirit was, its counsel submitted, a shareholder of Ukwanda. It was common cause that Street Spirit was a party to the shareholders' agreement and that it had been

issued shares subject to it making the loan provided for in clause 5.2.

[32] Counsel also submitted that Ukwanda did not, in its answering affidavit, take the point that the applicant was not entered in the register of members. Had it done so, he said, it would have been a simple matter for Street Spirit to call for an inspection of Ukwanda's share register. To raise the point for the first time in the appeal was unfair to Street Spirit. In this regard he relied on the principle that, as a general rule, a question of law can be advanced on appeal only if its consideration involves no unfairness to the other party. Moreover the raising of a new point on appeal will usually only be allowed if that point is covered by the pleadings.[7]

[33] It follows from the incidence of the onus that these submissions cannot be sustained: as I have said, the applicant's recourse to s 346(1) depended upon its making the allegation that it was litigating as a member of Ukwanda (a legal conclusion) and on setting up the factual allegations necessary to sustain that conclusion. Ukwanda would then in answer have been able to address the allegation or admit it as it was advised. Because Street Spirit did not do so the necessary substratum of its right to bring the application was absent from the beginning. Ukwanda was perfectly entitled to rely upon the defect on appeal.

[34] Counsel for Street Spirit nevertheless attempted to save his client's standing. He submitted that in terms of s 103(2) of the Act every person other than a subscriber who agrees to become a member of a company and whose name is entered in its register of Members shall be a member of a company. According to the argument, Ukwanda admitted that Street Spirit 'holds' shares in it.[8] That admission, he said, referred not to a mere beneficial holding but to a registered holding of the shares. He referred to s 1(3)(a) of the Act, in which for the purposes of the Act, a company shall be deemed to be a subsidiary of another company in specific circumstances. Subsection 1(3)(1)(cA) provides that:

'For the purposes of this subsection 'hold' or any derivative thereof refers to the registered or

[7] With reference to *Riddles v Standard Bank of South Africa Ltd* 2009 (3) SA 463 (T) at 470H-I.

[8] But as counsel for the respondent pointed out, that does not mean that Street Spirit's name was entered in the register of members as provided in s 103(2). See *Moosa v Lalloo* 1957 (4) SA 207 (D) at 221-2; *Watt v Sea Plant Products* 1999 (4) SA 443 (C) at 453. Nor does it speak to the duration of its inscription in the register.

beneficial holder (direct or indirect) of shares conferring a right to vote'.

According to counsel, it was in the sense used in that subsection that Ukwanda made the admission that Street Spirit held its shares.

[35] This was, in my view, a contrived argument which finds no support in the affidavits. Subsection (cA) attaches a special sense in a particular statutory context to the 'holding' of shares. That sense has nothing to do with the statutory concept of membership of a company. There is nothing to indicate that the deponent to the founding affidavit intended his words so to be understood or that they were so understood by Mr Barbas. The admission would only have been of assistance to the applicant if it were able to show that Barbas intended to admit that the facts necessary to bring it within s 346(1)(c).

[36] Counsel for Street Spirit also drew attention to the terms of two letters included in the application papers:

1. Annexure A9 to the founding affidavit, dated 3 July 2009 from Ukwanda's attorneys, Messrs Veneziano Inc, to Street Spirit in which the following is stated:

'3.2.3 Our client has previously demanded that you sign the CM42 in terms of which the shares issued to Street Spirit be transferred against payment of the par value of the shares. Our instructions are that the CM42 was submitted to your attorneys of record, Ramsay Webber Incorporated;

3.2.4 Notwithstanding demand, you have failed to sign the CM42 transferring the shares held by Street Spirit.'

2. Annexure R7 to the answering affidavit dated 9 April 2009 from the same attorneys which contains the following:

'Kindly further take note that our instructions are further that:

1. Street Spirit 92 (Pty) Ltd (“Street Spirit”) is currently a shareholder of Ukwanda Leisure Holdings (Pty) Ltd (“Ukwanda”);

2. a Shareholders Agreement had been entered into between the shareholders of Ukwanda;

3. Street Spirit has caused a “trigger event” for a “Forced Sale” as contemplated in clause 11.1.2 of the shareholders agreement;

4. our client tenders to Street Spirit the par value of the Ukwanda shares held by Street Spirit. Please find attached hereto a completed CM42 form for signature by a duly authorised director of Street Spirit. Kindly advise when the same can be collected. We confirm that the amount of R150 as being the par value of the share will be paid to you upon receipt of the signed CM42.’

Counsel submitted that the most probable inference to be drawn from the quoted passages is that Ukwanda knew and admitted that Street Spirit was registered as a member of Ukwanda.

[37] However Annexure A9 was referred to and relied upon in the founding affidavit neither in the context of membership in Ukwanda nor for the contents of paras 3.2.3 and 3.2.4 of the letter. The inference that Street Spirit seeks to draw from it is consequently equivocal. In any event, taken at face value, it reflects no more than a belief on the part of Ukwanda that Street Spirit was a registered shareholder at the time of the letter. Annexure R7 also does not contain an unequivocal admission that Street Spirit appears in Ukwanda’s register of members or that it had been so registered prior to April 2009. Taken singly or together the letters are insufficient to redress the deficiency in the founding affidavit.

[38] In the result I find that the learned judge erred in finding that the applicant had proved its status as a creditor of Ukwanda. He did not consider whether Street Spirit was a member but if he had done so he must have found that it had not shown itself to be one.

[39] The appeal consequently succeeds. The following order is made:

1. The appeal is upheld with costs.

2. The order of the court a quo is set aside and replaced with an order in the following terms:

‘The application is dismissed with costs.’

_____

J A Heher
Judge of Appeal

APPEARANCES

APPELLANT:	F H Terblanche SC
	Veneziano Inc, Pretoria
	Symington & de Kok, Bloemfontein
RESPONDENT:	L J Morison SC (with him X Stylianou)
	Ramsay Webber Inc
	c/o Andrea Rae Attorney, Pretoria
	Matsepes, Bloemfontein