THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable
Case no: **63/05**

In the matter between:

LINDERT HANEKOM Appellant

and

BUILDERS MARKET KLERKSDORP (PTY) LTD 1st Respondent

C HARDING N O 2nd Respondent

PETRUS JACOBUS MARYN VAN STADEN N O 3rd Respondent

ABSA BANK LTD T/A BANKFIN 4TH Respondent

THE MASTER OF THE HIGH COURT, PRETORIA 5TH Respondent

Coram : **SCOTT, ZULMAN *et* BRAND JJA**

Date of hearing : **15 FEBRUARY 2006**

Date of delivery : **2 MARCH 2006**

Summary: Interpretation of s 52 of the Close Corporations Act 69 of 1984 where the corporation has only one member

Neutral citation: This judgment may be referred to as *Hanekom v Builders Market Klerksdorp (Pty) Ltd* [2006] SCA 2 (RSA)

JUDGMENT

SCOTT JA/…

SCOTT JA:

[1] The issue in this appeal is the proper interpretation of s 52 of the Close Corporations Act 69 of 1984 ('the Act') in circumstances where a close corporation has only one member.

[2] The facts are largely common cause. The appellant was at all material times the sole member of RTMC Marketing CC ('the CC'). He was also the sole shareholder and director of LSL Konstruksie (Pty) Ltd. The latter became indebted to the first respondent in respect of goods sold and delivered. The CC stood surety for the debt. The deed of suretyship was signed by the appellant on behalf of the CC. The appellant also signed a suretyship in favour of the first respondent in his personal capacity. On the strength of these suretyships the first respondent afforded further credit to LSL Konstruksie which failed to discharge its debt and was placed in liquidation. Some time in 2001 the first respondent, relying on the suretyship executed on behalf of the CC, applied for the CC's liquidation. The application was not opposed. Subsequently, at a creditors meeting held before a magistrate on 29 October 2002, an attorney acting on behalf of the appellant objected to the first respondent's claim on the ground that the suretyship executed on behalf of the CC was invalid for want of compliance with s 52 of the Act. The objection was upheld and the claim was rejected. However, on 4 November 2003 the ruling of the magistrate was set aside on review at the instance of the first respondent and the latter's claim against the CC in liquidation was admitted. The liquidators of the CC (the second and third respondents in this appeal) thereafter arranged for an asset of the CC, a mobile concrete mixer, to be sold by public auction on 17 February 2004. On 10 February 2004 the appellant sought an urgent order in the High Court, Pretoria, for a stay of the sale. Claasen J granted the stay on condition that an application be brought within 10 days for an order declaring the suretyship to be invalid. That application was launched on 26 February 2004. The relief claimed was an order declaring the suretyship to be invalid for non-compliance with s 52 of the Act and for the consequential rescission of the liquidation order against the

CC, subject to certain conditions. The matter was heard by de Vos J who dismissed the application with costs. (*Hanekom v Builders Market Klerksdorp (Pty) Ltd and others* 2006(1) SA 423 (T)) The appeal is with the leave of the court *a quo*.

[3] The relevant provisions of s 52 read as follows:

'(1) A corporation shall not, directly or indirectly, make a loan –

(a) to any of its members;

(b) to any other corporation in which one or more of its members together hold more than a 50 per cent interest;

or

(c) to any company or other juristic person (except a corporation) controlled by one or more members of the corporation,

and shall not provide any security to any person in connection with any obligation of any such member, or other corporation, company or other juristic person.

(2) The provisions of subsection (1) shall not apply in respect of the making of any particular loan or the provision of any particular security with the express previously obtained consent in writing of all the members of a corporation.

(3) Any member of a corporation who authorizes or permits or is a party to the making of any loan or the provision of any security contrary to any provision of this section –

(a) shall be liable to indemnify the corporation and any other person who had no actual knowledge of the contravention against any loss directly resulting from the invalidity of such loan or security; and

(b) shall be guilty of an offence.

. . . .'

The appellant's contention is that the suretyship executed on behalf of the CC purported to secure a debt of a company which he controlled (LSL Konstruksie) and is invalid for the reason that when he executed it he did not have 'the previously obtained consent in writing of all the members of the corporation' as contemplated in s 52(2). In other words, he, as the sole member of the CC, had not previously consented in writing to the suretyship which he himself executed.

[4] At the outset it is necessary to make certain general observations regarding s 52. The first is that although ss (1) provides for a general prohibition and ss (2) an exemption from that prohibition, the object of s 52, read as a whole,

is undoubtedly to protect non-consenting members, ie to prevent a member from using the resources of a close corporation for his or her own benefit to the detriment of other members. The section seeks to achieve this by requiring not only that the other members consent to the loan or security but also that they do so in writing so as to provide written proof of that consent. Secondly, the consent that is contemplated is not consent on behalf of the close corporation in question but consent of the members in their personal capacities as members of that corporation. In this regard it is noteworthy that s 54 provides that any member is an agent of the corporation and subject to certain exceptions able to bind the corporation. Thirdly, although not expressly stated in s 52, it is clear from ss 3 that any loan or security falling within ss 1 and not exempted in terms of ss 2 is void and not capable of ratification. See *Neugarten and others v Standard Bank of SA Ltd* 1989 (1) SA 797 (A) at 808F in relation to s 226 of the Companies Act 61 of 1973. (Section 226(4) of the Companies Act corresponds to s 52 (3) of the Close Corporations Act.) In addition, s 52(3) not only renders the member who authorises an invalid loan or security liable to an innocent third party for loss but also makes him guilty of an offence. The penalty provided for in s 82(1)(a) is a fine not exceeding R2000 or imprisonment not exceeding 2 years or both fine and imprisonment.

[5] It is apparent from what has been said above that where a close corporation has only one member the section really serves no purpose. This is most certainly so in the case of a loan agreement signed by the member or a suretyship which in terms of s 6 of Act 50 of 1956 is required to be in writing and signed by or on behalf of the surety. Where there is only one member, not only are there no other members who require protection but the member signing the suretyship on behalf of the close corporation is notionally incapable of doing so unless he had previously in his personal capacity given himself permission to do so.

[6] Counsel for the appellant referred to the unambiguous language of s 52(2) and argued that there was nothing in the section to indicate that it did not apply to the case of a sole member of a corporation and that upon an ordinary reading of its provisions it was clear that in the absence of 'the express previously obtained consent in writing' of that sole member a suretyship securing the debt of a company controlled by him would not be exempted from the prohibition contained in s 52(1).

[7] The question that arises is whether a court would be justified in departing from the clear and unambiguous meaning of the section to avoid what the respondent categorised as a manifest absurdity. The circumstances in which a court will do so were stated by Innes CJ in *Venter v Rex* 1907 TS 910 at 914-915 to be –

'when to give the plain words of the statute their ordinary meaning would lead to absurdity so glaring that it could never have been contemplated by the legislature, or where it would lead to a result contrary to the intention of the legislature, as shown by the context or by such other considerations as the Court is justified in taking into account . . . .'

This approach has since been consistently followed. Over the years courts have repeatedly warned of the dangers of departing too readily from the ordinary meaning of the words of the statute and have stressed that the absurdity must be 'utterly glaring' or the true intention quite clear and not merely a matter of surmise or probability. On the other hand, as accepted in *Venter v Rex*, ambiguity in the provision in question is not a requirement for departure from its literal meaning. It has also been accepted that to avoid the absurdity or give effect to the true intention of the legislature it is permissible not only to cut down or restrict the language used but also so expand it. See eg the comments of Corbett J in *S v Burger* 1963 (4) SA 304 (C) at 308A-309B (cited with approval by Friedman J in *De Villiers v Kinsale Properties Share Block Ltd* 1986 (2) SA 592 (D) at 594G-595E).

[8] I have no doubt that to give effect to the unambiguous language of s 52(2) where the close corporation has only one member in circumstances such as the

present leads to an absurdity. Nothing can possibly be achieved by requiring the sole member of a close corporation before signing a suretyship on behalf of the corporation and in his personal capacity to give himself permission in writing to do so. As I have said, his signature on the suretyship demonstrates unequivocally his consent. Yet, on a literal interpretation of the section, the consequences of the absence of a prior written consent are not only that the suretyship in favour of the creditor is invalid, but also that the sole member is both personally liable and guilty of an offence. In passing, I mention that the appellant's personal liability for any loss would be cold comfort for the first respondent who already holds a suretyship executed by the appellant in his personal capacity. The object of the section, as previously indicated, is to protect non-consenting members. In circumstances such as the present, a literal interpretation does not achieve that object; it does no more than provide a sole member of a corporation with a defence which could never have been intended by the legislature.

[9] The conclusion to which I therefore come is that when construing s 52(2) in the context of a sole member of a close corporation who has signed a loan agreement or a suretyship on behalf of a corporation, the words 'previously obtained' must be disregarded. It is true that the loan agreement or suretyship would not refer to the member's consent as such. But that consent would be apparent on a proper construction of the agreement or suretyship. Neither document could exist without such consent.

[10] It follows that in my view the suretyship is valid and the appeal must fail.

[11] The appeal is dismissed with costs.

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D G SCOTT
JUDGE OF THE SUPREME COURT OF APPEAL

CONCUR:

ZULMAN JA
BRAND JA