IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

NOT REPORTABLE **CASE NO:1012/07**

In the matter between **DATE: 29/4/2008**

HILLCREST VILLAGE (PTY) LTD **FIRST PLAINTIFF**

CRYSTAL COOPER DE LA PIERRE N.O.

ROBERT ANDRE DE LA PIERRE N.O.

ELIZABETH JAKOBA FREDERIKA

VAN DER MERWE (formerly De Beer) NNO **SECOND PLAINTIFF**

And

NEDBANK LIMITED **FIRST DEFENDANT**

PIETER ARNOLDUS CRONJE **SECOND DEFENDANT**

ENVER MOHAMED MOTALA **THIRD DEFENDANT**

WATERKLOOFSPRUIT

PROJECTS (PTY) LIMITED **FOURTH DEFENDANT**

THE REGISTRAR OF COMPANIES AND

CLOSE CORPORATIONS **FIFTH DEFENDANT**

THE MASTER OF THE HIGH COURT (TPD) **SIXTH DEFENDANT**

DENNIS PEREIRA DA SILVA **SEVENTH DEFENDANT**

RANDPARK RIDGE EXTENSION 60	
DEVELOPMENT	**EIGHTH DEFENDANT**
RALOPH ROJAHN	**NINTH DEFENDANT**
DOTCOM TRADING 653 (PTY) LIMITED	**TENTH DEFENDANT**
BOE BANK LIMITED	**ELEVENTH DEFENDANT**
ABSOLUTE HOLDINGS LIMITED	**TWELFTH DEFENDANT**

JUDGMENT

MAVUNDLA J.,

[1] The second and third defendants have individually and separately brought an exception against the particulars of the plaintiffs, seeking to have all the averments in the plaintiffs' particulars of claim referring and relying upon a derivative action against the second and third defendant struck out, alternatively the plaintiff remedy such cause of action within a period given by the court failing such compliance be struck out.

[2] The parties have agreed that, since the exceptions by the

second and the third defendants are essentially identical, the third defendant will continue to have his exception argued. The result thereof will also be binding on the second respondent.

[3] The second and third respondents were appointed as joint provisional liquidators of WKP on 27 June 2001.

[4] The third defendant takes an exception to the plaintiffs' particulars of claim on the ground that same lack averments which are necessary to sustain a cause of action, alternatively lacking averments to sustain an action, are incapable of being supplemented to sustain a cause of action and are consequently bad in law.

[5] The attack on the particulars of claim are that the plaintiffs' first claim, as alleged in para 2 of the particulars of claim,

5.1 is based upon fraudulent conduct by one or more or all of the Defendants, but more in particular, as far as the third defendant is concerned, by the third defendant

perpetrated upon the company Waterkloofspruit Projects (Pty) Ltd.

5.2 Save for certain exceptions, in general, when a wrong is alleged to have been done to a company the proper plaintiff to sue the wrongdoer/s is the company itself;

5.3 the exception to the aforesaid rule is that a shareholder has a derivative action when the wrong complained of involves conduct which is either fraudulent or *ultra vires,* and or the wrong has been perpetrated by directors or shareholders who are in the majority and so control the company.

5.4 none of the defendants are averred by the plaintiff to be either directors and or shareholders nor is there any averment that any majority of such directors and or shareholders constituted by one or more or all of the defendants , ever existed, on the contrary it is averred in the particulars of claim that the defendants were all outsiders, i.e. persons not being directors and or shareholders of Waterkloofspruit Projects (Pty) Ltd.

5.5 and that therefore the derivative action the plaintiff seeks to enforce lacks averments which are necessary to sustain a valid cause of action and bad in law.

[6] The second defendant further, in addition or in the alternative, contends :

6.1 that the common law derivative action is available to a shareholder only where the company in which the shareholder holds his shares *in esse* yet fails to institute an action against the wrongdoer,

6.2 that according to the plaintiff, Waterkloofspruit Projects (Pty) Ltd

was not *in esse* at the time of the issuing of the plaintiff's summons and is still not *in esse* at the time of the issue of the exception,

6.3 that therefore, given the nature of the plaintiff's derivative action of a shareholder, albeit based upon a cession of such derivative action, the plaintiff's cause of action lacks averments to sustain a valid cause of

action, alternatively is incapable of being supplemented by averments sustaining a valid cause of action and is bad in law.

6.4 That the plaintiff sued the second and third defendants in their personal capacities, and

6.5 that the alleged irregularities and malpractices referred to in the plaintiff's particulars of claim were acts performed by the second and third defendants under circumstances where they were the duly appointed joint liquidators, and the plaintiff should have sued them in their capacities, *nomine officio,* and not in their personal capacities.

[7] In opposing the exception, the plaintiffs state that the exceptient has failed to have regard to the allegations made at pp53, 54 and 55, namely that: …'Nedbank, as successor to BOE, and also in its own name, and together with Cronje and Motala, have used their control and sought to ensure that no action could be brought by WKP (in liq), to obtain

redress against any of them…".

[8] The plaintiffs have averred, inter alia, in their particulars of claim under paragraph 1 that:

"1.15.

1.5.1 The 100% shareholder of WKP (in liquidation) at the time of its liquidation was certain company Gilboa Properties Limited (Gilboa).

1.5.2 On 23 February 2005, Gilboa changed its name to Absolute(the twelfth defendant).

1.16. on 7 May 2001, Gilboa ceded and assigned to CTM "all

its right, title and interest in and to all claims which Gilboa (then) or in future (might) have against (BOE) or any subsidiary and or division thereof or any third party, in Waterkloofspruit Projects (Pty) Limited (hereinafter referred to as WKP)… not limited to any specific cause of action and (including) any claim or claims which emanates or might emanate from or in

respect of the liquidation of WKP and or any claim in respect of the Waterkloof Boulevard Project on certain terms and conditions as appears more fully from annexure “A” hereto.

1.17

1.17.1 On 14 February 2001, Cronje was appointed as provisional liquidator of WKP (in liq) and shortly thereafter Motala was appointed joint provisional liquidator of WKP (in liq), with Cronje.

1.17.2 Cronje and Motala were appointed joint liquidators of WKP (in liq) on 27 June 2001.

1.18

1.18.1 Cronje and Motala managed and controlled the affairs of WKP (in liq) from approximately 14 February 2001 until its dissolution on 27 May 2004.

1.18.2. Such management and control was performed with and under the supervision and control with and under the supervision and control of BOE, and subsequently was performed in conjunction with and

under the supervision and control of Nedbank with effect of 1 January 2003.

1.19. BOE was represented at all material times (and save as set out hereinbelow), inter alia, by Hermanus Johannes Louw Janse van Ransburg (Van Rensburg), the in-house legal adviser of BOE, and Keith Napier Adams (Adams) the regional head of property finance at BOE, they acting in the course and scope of their employment with BOE, and being duly authorised thereto."

[9] Paragraph 2 of the particulars of claim runs into 27 pages[1]. For purposes of this judgment, I do not intend to repeat this paragraph in its entirety. I shall, however, selectively repeat some of the allegations thereof, hereinbelow.

[10] Paragraph 2 reads inter alia as follows:

"2. **THE "REPO SCAM", INCLUDING THE COLLUSIVE**

1 Paginated pages 18-45.

CONDUCT, THE SHAM AUCTION AND TRANSFER OF THE IMPROVEMENTS ON THE 14 STANDS TO RANDPARKRIDGE WITHOUT COMPENSATION THEREFOR

2.1 Not later than 2000, one or more or all of BOE, Van Rensburg, Adams and Cronje devised and/or adopted and/or participated in a fraudulent scheme calculated and designed to prejudice companies possessed of immovable property, their shareholders, and private individual/s possessed of immovable property, as well as the sureties liable to BOE, for the debts of any such persons to BOE by way of a scheme described *inter alia*, a "repo-scam", for the benefit, *inter alia,* of one or more or all of BOE, Van Rensburg, Adams and Conje.

2.2 One or more or all of Motala, Da Silva, Randparkridge, Rojahn, Dotcom, Sterling Auctions Pretoria (Pty) Ltd (hereinafter referred to as Sterling) and certain

attorney Anthony Berlowitz (Berlowitz), during the period mid-2000 to at least 27 May 2004, identified and associated themselves in the "repo-scam" with BOE, Van Rensburg, Adms and Cronje and participated in the "repo-scam", and for the benefit of each of them.

2.3

2,31.

2.3.1.1 Sterling was represented *inter alia* by its managing director, certain Henk van der Walt (Van der Walt).

2.3.1.2 Sterlin has since been placed under final winding-up order and has been liquidated.

2.3.1.3 Van der Walt has died.

2.3.2 Berlowitz has been sequestrated.

2.4 Gilboa and the plaintiffs first became aware of the existence of the "repo-scam" no earlier than 27 January 2004, having become first alerted thereto by certain Pretoria News newspaper article, copies of

which are annexed hereto marked “B1-2’;

2.5—2.19….

2.20

2.20.1 On 19 February 2001, Cronje describing himself as a joint liquidator, made application to the Master for an urgent auction of the property and received such authority on such date, as will appear more fully from annexure “K” hereto.

2.20.2. The said application to the Master was deliberately misleading in that the allegation made, “(d)it blyk dat die bedrag huidiglik uitstande op die verband nie naasterby verhaal sal kan word uit die opbrings van die veiling nie…” was calculated and designed to mislead the Master having regard to the fact that the property was worth at least some R40 million.

2.21 Cronje and Motala failed to place the requisite advertisements for the auction as required in terms of Section 82(1) of the Insolvency Act as

read with section 80(bis) of the Insolvency Act in so far as such latter section may be applicable, such failure also being fraudulent, alternatively negligent.

2.22.

2.22.1 There was no intention on the part of Cronje and Motala and Sterling to sell the properties individually as alleged in condition 1 of annexure “K”.

2.22.2 Condition 8 of annexure “K” was also introduced by Cronje to mislead and to confuse the issue by making a provision for the sale of the development as a whole, “om sodoene to verseker dat die maksimum voordeel vir die verbandhouer verkry sal word”.

2.22.3 The purpose of the “Repo-scam” and the collusive dealings *inter alia* with Da Salva and Rojahn as aforesaid, would have been defeated had had the auction been permitted to continue as a

genuine auction, and allow for individual stands to be sold to any other potential buyer at the auction, or thereafter.

2.23. The intention of Cronje and Motala, acting on instructions of BOE, was:-

2.23.1 to conduct a sham scham;

2.23.2 not to allow for a *spatium deliberandi* to consider any offers made at the auction;

2.23.3 to preclude intending purchasers from making genuine offers for individuals stands or otherwise, either at the auction or during a spatium deliberandi after the auction;

2.23.4 to inhibit other potential purchases who might attend the auction from attending the auction.

2.24.

2.24.1. Shortly prior to the auction, certain Hendrik Wemeyer Joubert discussed with Van Rensburg on behalf of BOE, the possibility of acquiring the remaining 137 stands of the Waterkloof Boulevard Project for

some R20 million.

2.24.2 Van Rensburg, representing BOE as aforesaid, advised Joubert that at that stage, Joubert was wasting his time and that he need not even attend the auction.

2.24.3 Relying on such advice, Joubert did not attend the auction.

2.25. The auction conducted by Sterling took place on 20 March 2001.

2.26.

2.26.1. At the aforesaid auction, BOE stated to those present that it would not confirm any bid unless the proceeds of such bid would be sufficient to pay the outstanding bond, further advances made by BOE from time to time and interest, totalling in all R25 million.

2.26.2 BOE acted unlawfully by so stating and thereby misled mislead and put of the potential purchasers then present, in claiming that (BOE) was entitled

to confirm for the property and would not confirm any bid unless it was sufficient to pay the outstanding bond, further advances made by BOE from time to time and the interest, in all totalling R25 million.

2.26.3 BOE misled and put off any potential purchaser then present, in advising that the price expected by it (BOE) was way above a reasonable market value at that stage, despite the fact that a reasonable market value to the knowledge of BOE was in excess of R25 million.

2.26 .4 Sterling, on instructions of BOE, ended the auction without offering any stands individually to potential purchasers there present.

2.22.7

2.27.1 Accordingly, BOE in so conducting itself as set out in paragraph 2.26 above, unlawfully prevented a genuine auction from taking place.

2.27.2 Sterling, Cronje and Motala participated with BOE

in such unlawful conduct and prevented a genuine auction from taking place.

2.27.3 One or more or all of Sterling, Cronje and Motala benefited thereby."

2.28. Pursuant to such unlawful conduct, BOE wrongfully sought to acquire the 137 stands of the Waterkloof Boulevard Project for R100 000 (I.e. on average some R730 per stand).

2.29….

2,30.

2.30.1 The sale to Da Silva referred to above in paragraph 2.11.1 above (annexure "G" hereto) was not proceeded with, but Cronje and Motala as joint provincial liquidators of WKP (in Liq), sold and later transferred directly to Randparkridge (Da Silva's nominated company) 33 cluster stands for the sum of R5 616 970, 00 averaging approximately
R170 000, 00 per cluster stand.

2.30.2 The 33 cluster stands sold and transferred to Randparkridge by Cronje and Motala as aforesaid, included the 14 stands where partial building by Da Silava had taken place prior to liquidation and the value of which improvements had increased the value of such stands by at least an additional R8.4 million.

2.30.3

2.30.3. 1 The improvements on these stands, totalling some R8,4 million, were assets of WKP (in liq) nor was any amount paid in respect thereof by Randparkridge which no compensation was ever received by WKP (in liq), nor was any amount paid in respect thereof by Randparkridge.

2.30.3.3 The failure to pay compensation therefore by Randparkridge:-

2.30.3.2.1 unjustly and unlawfully enriched Randparkridge in the said sum of R8.4 million;

2.30.3.2.2 impoverished WKO (in liq) in the amount of

R8.4 million;

2.30.3.2.3. enriched Randparkridge at the expense of WKP (in liq);

2.30.3.3.4 unjustifiably and/or sine causa enriched Randparkridge, there having been no legal or natural obligation to make such payment.

2.30.3.2,5 also constituted part of the implementation of the collusive disposition prior to liquidation referred to above in paragraph 2.17-19."

10] The contention of the defendant is that a derivative action is brought on behalf of a company against a wrongdoer who is in control of the company. For this submission, reliance is made on Kalinko v Nisbeth & Others 2002 (5) 766 (WLD0 777I, 778C and Meskin Hennochsberg on Companies Act , p67. The existence of a derivate action constitutes an exception to the rule that because a company is an independent legal, entity and separate from its shareholders and directors, when a wrong is alleged to have been done to

a company, the proper plaintiff to sue the wrongdoer is the company itself, which must be in *esse*. In this regard the defendant relies in the judgment of Frances George Hill Family Trust v South African Reserve Bank & Others 1992 (3) SA 91 (AD) p.97C-D.

[11] The defendants further contend that whereas in paragraph 4 of the exception none of the defendants are averred by the plaintiffs to be either directors and or shareholders nor is there any averment that any majority of such directors and or shareholders constituted by one or more or all of the defendants ever existed. It is further contended that it is plaintiffs' case that the defendants were all so-called 'outsiders (i.e. persons not being directors and or shareholders of Waterkloofspruit Projects (Pty) LTD). It is further contended that the exception to the general rule of derivative action, is that it applies only where insiders act wrongfully.

It is further contended that the action is premature because

the circumstances and jurisdictional prerequisites for a derivative action do not exists since the relevant company was liquidated. Although there is a pending action to revive the liquidated company (Waterkloofspruit Projects (PTY) LTD on whose behalf a derivate action can be brought, such entity does not exists, and therefore the action is premature., and therefore the exception should be upheld.

[12] On behalf of the plaintiff it has been submitted that fundamental to the exception is the contention that a shareholder has a derivative action when a wrong complained of involves a conduct which is either fraudulent or *ultra vires* and the wrong has been perpetrated by directors of shareholders who are in the majority and so control the company. The plaintiffs contend that the defendant has failed to have proper regard to the allegations made at pp53, 54 and 55. It is further contended by the plaintiffs that the distinction sought to be drawn by the defendant between “insiders” and “outsiders” in the

exception is a distinction which in the present case is of no substance or application. The plaintiffs contend that the persons who controlled the company at the time relevant were, inter alia, Cronje and Motala, and they acted fraudulently.

[13] The relevant pages 53, 54 and 55, referred to relate to paragraph 4 of the particulars of claim. Paragraph 4 of the particulars of claim, sets out the basis of the derivative action as follows:

"4.1 At all material times and more particularly from 21 July 2000, BOE, represented by Van Rensburg and Adams, controlled WKP, and from 19 February 2001 , controlled WKP (in liq) having colluded to ensure:-

4.1.1 The appointment of Cronje and Motala as liquidators of WKP (in liq);

4.1.2. The appointment of Sterling as auctioneers to conduct the sham auction, so as to benefit at least on or more or all of them i.e. one or more or all of BOE,

Van Rensburg and Adams, Cronje ,Motala and Sterling (and subsequently also Da Silva, Randparkridge, Rojahn and Dotcom), in order to give effect to the "repo-scam" performed as hereinbefore set out.

4.2 At all material times and to date hereof, Nedbank as successor to BOE, and also in its own name, and together within Cronje and Motala, have used their control and sought to ensure that no auction could be brought by WKP (in liq), to obtain redress against any of them, as appears more fully from their opposition and non-disclosure in case n o 4741/06, referred to above.

4.3 The aforegoing conduct was wrongful and in breach of duty.

4.4 One or more or all of the aforegoing persons sought to appropriate to themselves money , property or other advantages which belonged to WKP (in liq), alternatively money, property or other advantages in which Gilboa and its successor CMT, was and is entitled to participate.

4.5 By virtue of the aforegoing, the derivative action is available to Gilboa and consequently to its successor, CMT:-

4.5.1 a fraud having been perpetrated as aforesaid on the shareholder of WKP (in liq), alternatively the shareholder of WKP and/ or its cessionary CMT;

4.5.2 there being in the circumstances an absolute necessity to waive the rule that the company alone (i.e. WKP (in liq)) can sue, so to ensure that there may not be a denial of justice."

[14] In the matter of Dilworth v Reichard[2], Claasen J stated that: "It is trite that the proper approach to be adopted by the Court, is to adjudicate the validity or otherwise of the exception on the basis of the facts alleged by the plaintiff being regarded as correct. The court must look at the pleadings excepted to, as it stands. No facts outside those stated in the pleading excepted can be brought into

2 2002 [4] ALL SA 677 (W) at 681

contention and no reference may be made to any other document. In order to succeed, the excepient has the duty to persuade the court that upon every interpretation which the pleading in question can reasonably bear, no cause of action is disclosed." Vide also Vogel v Kleynhans.[3]

[15] I need also bear in mind what was said in the matter of Barclay National Bank Ltd v Thomson[4] by Van Heerden JA, namely: "… that the main purpose of an exception that a declaration does not disclose a cause of action is to avoid the leading of unnecessary evidence at the trial: Dharumpal Transport (Pty) Ltd v Dharumpal 1956 (1) SA 700 (A) at 706. Save for exceptional cases, such as those where a defendant admits the plaintiff's allegations but pleads that as a matter of law the plaintiff is not entitled to the relief claimed by him (cf Welgemoed en Andere v Sauer 1974 (4) SA (A)) an exception to a plea should consequently also not be allowed unless, if upheld, it would obviate the leading of

3 2003 (2) SA 148 (C).

4 1989 (1) SA 547 (AD) at 553G-H

'unnecessary' evidence."

[16] Meskin at 822 says that in "Fargo Ltd v Godfroy [1986] 3 ER 279 (CH) it was held that a minority shareholder's derivative action (as to which, see general note on sec36) will not lie if the company is in liquidation. Although before liquidation the minority shareholder could have brought an action on the ground of that the wrongdoers were in control of the company, with liquidation the situation is completely changed because there is no longer a board of directors or shareholders' meeting, "which is in any sense in control of the activities of the company of any description…. On liquidation the aggrieved shareholders have two courses open to them. First, they can ask the liquidator to bring the action on behalf of the company, and the liquidator can ask for indemnity from them against all costs, including the costs of the defendants, which he may have to incur in bringing the action. Secondly, if the liquidator asks for unreasonable

terms, or is unwilling to bring the action, the shareholder can apply to Court (see ss387(4) and 388 of the Act .

[17] In Frances George Hill Family Trust v South African Reserve Bank & Others[5] it is stated that: "It is trite that a company with limited liability is an independent legal person and separate from its shareholders or directors. In general, therefore, when a wrong is alleged to have been done to a company the proper plaintiff to sue the wrongdoer is the company itself. In English law a derivative action constitutes an exception to that general rule. The exception is recognised when (1) the wrong complained of involves conduct which is either fraudulent or ultra vires and (2) the wrong has been perpetrated by directors or shareholders who are in the majority and so control the company. See, for example: *Burland and Others v Earle and Others [1902] AC D 83 (PC); Edwards and Another v Halliwell and Others [1950] 2 All ER 1064 (CA) at 1066-7; Prudential Assurance*

5 1992 (3) SA 91 (AD) at 97C-D

*Co Ltd v Newman Industries Ltd and Others (No 2) [1982] 1 All ER 354 (CA) at 1064;*The principle underlying the exception to the general rule is expounded thus by Lord Denning MR in *Wallersteiner v Moir (No 2); Moir v Wallersteiner and Others (No 2) [1975] E 1 All ER 849 (CA) at 857d-f:*

'If it is defrauded by a wrongdoer, the company itself is the one person to sue for the damage. Such is the rule in Foss v Hardbottle. The rule is easy enough to apply when the company is defrauded by outsiders. The company itself is the only person who can sue. Likewise, when it is defrauded by insiders of a minor kind, once again the company is the only person who can sue. But suppose it is defrauded by insiders who control its affairs - by directors who hold a majority of shares - who can then sue for damages? Those directors are themselves the wrongdoers. If a board meeting is held, they will not authorise proceedings to be taken by the company against themselves. If a general meeting is

called, they will vote down any suggestion that the company should sue them themselves. Yet the company is the one person who is damnified. In one way or another some means must be found for the company to sue. Otherwise the law would fail in its purpose. Injustice would be done without redress.'"

[18] For purposes of this matter, in particular in the light of the authority cited herein above[6], I must therefore accept, as I do, the averments contained in the plaintiffs' particulars of claim. On the strength of these averments, I must accept that the first and second defendants, inter alia, were at one or other stage occupying position of trust by virtue of their appointments as provisional liquidators and final liquidators of KWP (in liq). As the liquidators of KWP (in liq) they stepped in the shoes of the shareholders of KWP(in liq). They are expected, in winding up KWP (in liq) to act in the best interest of the shareholders and creditors, especially when they dispose of the assets of KWP (in liq). It is not

6 Dilworth v Reichard (supra)

expected of them to dispose of the assets of KWP (in liq) by selling these for a lesser amount, as it is averred in paragraph 4, if these could have been sold in an open market for much more than what they eventually sold the stands for. It has been alleged that they manipulated the situation in such a way that the public auction was not held. They sold some of the immovable property on which there had been improvements, at a far reduced price.

[19] In view of the fact that Mr. Cronje and Mr. Motala, as the joint liquidators of KWP (in liq, they were the people who were supposed to have brought on behalf of the KWP (in liq) any delictual action premises on fraud, against the wrongdoers. Since the wrongdoers are the very joint liquidator who must act on behalf of the KWP (in liq) it could not have been expected that they would have brought the derivative action against themselves. In such circumstances "some means must be found for the company to sue."[7] In such situation, the dictates of equity and fairness, in my

7 Frances George Hill Family Trust v South African Reserve Bank & Others (supra).

view, demand that those interested parties, as the plaintiffs, in casu, are permitted to approach the Courts for redress under the derivative action against the second and third defendants, and any other party who benefited from the fraudulent conduct of Mr.Cronje and Mr. Motala; vide TWK Agriculture LTD v NCT Forestry Co-operative Ltd and Others.[8]

[20] It needs to be recorded that, simultaneous with this matter, it

---

8 2006 (6) SA 20 (NPD) at 24 D-G: " 10] This rule is subject to the exception that a shareholder will be allowed to enforce the company's rights where those who control the company, wrongfully or in breach of duty, benefit themselves and, by use of their control, ensure that no action is brought by the company to obtain redress. The qualification was described in Burland v Earle 4 as follows:

'Again, it is clear law that in order to redress a wrong done to the company or to recover moneys or damages alleged to be due to the company, the action should prima facie be brought by the company itself. . . . But an exception is made to the second rule, where the persons against whom the relief is sought themselves hold and control the majority of the shares in the company, and will not permit an action to be brought in the name of the company. In that case, the Courts will allow the shareholders complaining to bring an action in their own names. This, however, is mere matter of procedure in order to give a remedy for a wrong which would otherwise escape redress, and it is obvious that, in such an action, the plaintiffs cannot have a larger right to relief than the company itself would have if it were plaintiff, and cannot complain of acts which are valid if done with the approval of the majority of the shareholders, or are capable of being confirmed by the majority.'" et 28D-G

was argued before me matter under case number 1012,07 which essentially involves the same parties as in casu. In that matter it is sought, inter alia, an order resuscitating the already liquidated company KWP (in liq)[9]. It is also sought that other liquidators must be appointed. I have also been informed that the Registrar of Companies in that matter is not opposed to the resuscitation of the already wound up company. I shall in due course deal with the relevant judgment in the said matter. The contention of the defendant that KWP has already been wound up, is no defence to the present action, since section 420 of the Companies Act creates a mechanism for the resuscitation of the wound up company. I am of the view that the defendant has not shown "that upon every interpretation which the pleading in question can reasonably bear, no cause of action is disclosed.".

9 Vide Ss420 of the Companies Act which provides for the Court, on application by the liquidator or any other person who appears to the Court to have an interest, to make an order, upon such terms as the Court thinks fit, declaring the dissolution to have been void, and thereupon any proceedings may be taken against the company as might have been taken if the company had not been dissolved.

[22] I also bear in mind the provisions of s424(1)[10] of the Companies Act, which makes provision for holding personally liable a person who carried the business of a company which he was in control of or as a director recklessly or with intent to defraud creditors of the company, or for any fraudulent purpose. The fact that the particulars of claim do not specifically cite the second and third defendants in their personal or official capacity is, in my view, of no great moment for purposes of deciding on the exception.

[23] Having regard to what I have stated herein above, I am of the view that the application for exception must fail. I am also of the view that this matter warranted the services of senior counsel and that the plaintiffs are entitled not to be put out of pocket for opposing this application.

---

10 The relevant portion of s 424(1) provides as follows:

'When it appears, . . . that any business of the company was or is being carried on recklessly or with intent to defraud creditors of the company . . . or for any fraudulent purpose, the Court may, on the application of . . . any creditor . . . declare that any person who was knowingly a party to the carrying on of the business in the manner aforesaid, shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court may direct.'

[24] In the premises I make the following order:

1. That the exception is dismissed with costs, which costs shall include the costs of senior counsel.

N.M. MAVUNDLA

JUDGE OF THE HIGH COURT

HEARD ON THE : 18 SEPTEMBER 2007.

DATE OF JUDGMENT : 29 APRIL 2008.

PLAINTIFFS' ATT : MR. K BOSHOFF.

PLAINTIFFS' ADV : MR. DA BREGMAN SC.

2ND DEFENDANT`S ATT : MR. S.A. TINTINGER

2ND DEFENDANT'S ADV : MR. MP VAN DER MERWE

3ND DEFENDANT'S ATT : MR. W FORREST

3ND DEFENDANT'S ADV : MR. TA AL POTGIETER

: