



THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

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***Ebrahim v Airports Cold Storage (Pty) Ltd (485/2007) [2008]
ZASCA 113 (25 September 2008)***

The Supreme Court of Appeal today dismissed an appeal by a father and a son who sought to escape personal liability for the debts of a closed corporation they ran.

The CC, Sunset Beach Trading 232 CC, trading as 'Global Foods', bought frozen meat and other comestibles from the plaintiff, Airports Cold Storage, in 2005. But it ran into difficulties, still owing the plaintiff some R278 000. The plaintiff put the CC into liquidation, but it proved to have no assets. The plaintiff then obtained a judgment in the High Court in Cape Town under the Closed Corporations Act 69 of 1984 holding Mr Nizaar Ebrahim (the CC's sole member) and his father, Mr Abbas Ebrahim (who was deeply involved in running the CC), personally liable for the debt.

The Closed Corporations Act and the Companies Act 61 of 1973 have practically identical provisions that grant a court power to fix personal liability for the debts of a corporation on various persons

if they are knowingly party to reckless or fraudulent trading by the corporation.

In the Cape High Court, Griesel J found that the Ebrahims and the rest of their family had used 'a host of entities and trading names at different stages' to pursue their business interests, and that in doing so they had 'scant regard' for the entities' separate corporate identities. He found that they had traded recklessly and fraudulently within the meaning of the statutory provision.

The SCA upheld all Griesel J's findings about the Ebrahims' reckless business and trading methods, though it found it unnecessary to go further and establish whether they had also been guilty of fraud.

The SCA found that both Ebrahims conducted the CC's business with blithe disregard of statutory requirements; that they had no conception of, nor respect for, the fact that the CC was a distinct legal entity with a separate legal existence; and that they showed reckless disregard for the CC's capacity to accumulate assets of its own.

Some R300 000 in takings were unaccounted for; in the absence of any other explanation – and there was none – it had to be inferred that the Ebrahims had taken or spent this cash instead of accounting for it through the CC.

The SCA held that although juristic persons are recognised by the Bill of Rights – they may be bound by its provisions, and may even receive its benefits – close corporations and companies have a separate identity only by virtue of statute. Their separate existence is thus a figment of law, liable to be curtailed or withdrawn when the objects of their creation are abused or thwarted. The statutory provisions retract the attribute of corporate personality, namely separate legal existence, with its corollary of independent liability for debts, when the level of mismanagement of the corporation's affairs exceeds the merely inept or incompetent and becomes heedlessly gross or dishonest.

The provisions in effect exact a quid pro quo: for the benefit of immunity from liability for its debts, those running the corporation may not use its formal identity to incur obligations recklessly, grossly negligently or fraudulently. If they do, they risk being made personally liable.

This case, the SCA held, illustrates why the provisions play an important role in corporate governance – they remind those who run corporations, and those knowingly party to their business methods, that the shadow of personal liability can fall across their dealings.

The SCA also rejected a challenge the Ebrahims' attorney directed at the trial judge's impartiality. The SCA held that the entire absence of any warrant for the allegations meant that they should never have been made.