REPORTABLE

OF INTEREST TO OTHER JUDGES

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

CASE NO: **C45/2010**

In the matter between:

BERNADETTE ZEMAN Applicant

and

ANTHONY CHARLES QUICKELBERGE First Respondent

THE RAILWAY SHED CC Second Respondent

JUDGMENT

STEENKAMP J:

1. This application concerns the vexed question of lifting the corporate veil. It also addresses the question of the appropriateness of a costs award where the applicant is represented on a *pro bono* basis.

2. The Court is being asked to adjudicate on:

    2.1 whether the Second Respondent ("the CC") carried on in a manner that was intended to defraud the Applicant ("Zeman");

    2.2 alternatively, whether the CC carried on in a manner that was grossly negligent;

    2.3 alternatively, whether there was a gross abuse by the First Respondent ("Quickelberge") of the CC's separate corporate personality, either under statute or under common law.

3. Zeman seeks an order that Quickelberge be held personally responsible for the debts owed by the CC to Zeman, in the amount of R39 000 with *mora* interest calculated from 21 December 2007.

4. Bernadette Zeman is the Applicant ("Zeman"), Anthony Charles Quickelberge is the First Respondent ("Quickelberge") and The Railway Shed CC is the Second Respondent ("The CC").

5. No notice of intention to defend or answering papers were filed by either Quickelberge or the CC. The matter is therefore heard on an unopposed basis.

BACKGROUND FACTS

6. Zeman worked for Sopranos Restaurant ("the Restaurant"), a restaurant in Robertson that is owned by the CC.

7. Zeman was unfairly dismissed from her employment as a manager of the Restaurant on 19 September 2007. She started working as head chef on 1 May, ironically as it turns out, and worked her way up to manager.

8. After her dismissal, she referred a dispute to the CCMA. It was arbitrated on 13 November 2007. The arbitrator found the dismissal to have been both procedurally and substantively unfair and awarded Zeman compensation of R39 000.00, to be paid on or before 21 December 2007.

9. The Respondent in the arbitration award was the CC. The sole member of the CC at the time of the award was Quickelberge. Neither he nor anyone appointed to represent him appeared at the arbitration. The Commissioner proceeded with the arbitration nonetheless because he was "satisfied that proper notice of set down had been issued in terms of the CCMA rule 30(2)" - (paragraph 1 of the arbitration award ("the award")).

10. On 15 January 2008, less than a month after the date on which the CC had to pay Zeman the compensation as ordered, Quickelberge signed an agreement of sale authorising the CC to "sell" its assets to the Quickelberge Family Trust ("the Trust").

11. The assets so "sold" were dealt with as follows, explained in a letter by Mr Falck, Quickelberge's attorney, to Sheriff Koen:

    11.1 the Trust paid no money for the assets, supposedly because of a prior loan to the CC, conveniently constituting an exact off-setting of the debt;

12.2 the assets (essentially kitchen and restaurant equipment used to run a restaurant) were never taken possession of by the Trust, and were simply left with the restaurant who had “the privilege to utilise the attached assets”; and

12.3 the CC guaranteed that the assets are free of any security, or attachment from claims from third parties.

EVIDENCE OF GROSSLY NEGLIGENT OR FRAUDULENT CARRYING ON OF A BUSINESS OF A CLOSE CORPORATION, ALTERNATIVELY, GROSS ABUSE OF THE SEPARATE CORPORATE PERSONALITY IN TERMS OF S 64(1) AND S 65 OF THE CLOSE CORPORATIONS ACT, ALTERNATIVELY THE COMMON LAW

12. Quickelberge knew about the arbitration and he knew that an award could be made against him in his absence. The Commissioner was “satisfied that proper notice of set down had been issued in terms of the CCMA rule 30(2)” on the CC, and Quickelberge was the CC’s sole member at the time. Despite knowing about the award against the CC, or at the least, in circumstances where he should have known about the award, Quickelberge, on behalf of the CC, signed an agreement of sale in which the CC transferred its assets to the Trust on 15 January 2008 divesting itself of all its assets, either knowing that a debt was owed, or in circumstances where it was reckless to do so.

13. Apart from the transfer of assets themselves in order to avoid a legal obligation, evidence can also be found in the contents of the "sale agreement" itself, the agreement that transferred the assets of the CC to the Trust.

14. The following parts of the "sale agreement" as well as the letter by the CC's and Quickelberge's attorney, Mr Falck, are relevant and are quoted below for ease of reference:

> *14.1 "Purchase price*
>
> *1.1 The purchase price is the sum of R100 000.00 (One hundred thousand RAND) payable by the Purchaser to the Seller as follows:*
>
> *1.2 The full purchase price has already been paid in terms of loans made fro [sic] the Purchaser to the Seller.*
>
> *14.2 Guarantees*
>
> *The Seller guarantees that it is the owner of the property and that it is free of any security, attachment for claims from third parties [sic]."*

15. For the sake of convenience I also note the relevant paragraphs of Mr Falck's letter to the sheriff:

> *"Soprano's Restaurant is owned by The Railway Shed CC, CK Number 2006/188191/23.*
>
> *The assets of The Railway Shed CC were sold to the Quickelberge Family Trust 457/98 on 15 January 2008. The items that you attached*

therefore does [sic] not belong to Soprano's Restaurant but in fact belongs to a Trust from which Soprano's Restaurant has the privilege to utilise the attached assets."

16. I agree with Mr *Ackermann*, who appeared for the applicant, that, if regard is had to these documents, the inference that the sale was done with a fraudulent purpose, or at the very least as an abuse of corporate personality, is inescapable:

    16.1 This was a disposition without value. If indeed there was a pre-existing loan no evidence to this effect was produced. It is a hastily concocted "Deed of Sale" put together solely for the purpose of not having to pay Zeman the compensation awarded to her.

    16.2 In addition the value of the attached assets are R30 000.00. They were "sold" to the Trust for R100 000.00. Even discounting a conservative estimate by the sheriff of the value of the assets the discrepancy of R70 000.00 is large enough to reasonably infer that either all the assets were not pointed out to the Sheriff when he came to attach, or that the "sale" of the assets to the Trust was a deal so hastily cobbled together that a proper inventory and valuation of the assets was never made.

    16.3 Quickelberge as a signatory to the "Deed of Sale" guarantees that the assets are free from any "attachment for claims from third parties". He does so with full knowledge of the arbitration award against him, or at the least with gross negligence and recklessly, in

circumstances where he reasonably ought to have known that an attachment claim from third parties was extant in the form of an arbitration award against him.

16.4 In addition regard must be had of the arrangement between the CC and the Trust as it relates to the use of the assets by the CC (Soprano's Restaurant):

> *The items that you attached therefore does [sic] not belong to Soprano's Restaurant but in fact belongs to a Trust from which Soprano's Restaurant has the privilege to utilise the attached assets."*

17. I agree with Mr *Ackermann* that this is a fraudulent attempt by Quickelberge, acting as a puppet master, and using the separate corporate personality of the CC, to avoid paying the debts of the CC, while at the same time keeping the CC operating the restaurant as though nothing had happened.

THE APPLICABLE LEGAL PRINCIPLES

Section 64 (1) of the Close Corporations Act[1] *- Liability for reckless or fraudulent carrying-on of business of corporation*

18. In ***Ebrahim and another v Airport Cold Storage (Pty) Ltd*** [2] the Supreme Court of Appeal held that:

"Acting recklessly consists in an entire failure to give consideration to the consequences of one's actions, in other words, an attitude of reckless disregard of such consequences. In applying the recklessness test to the running of a close corporation, the court should have regard to amongst other things the corporation's scope of operations, the members' roles, functions and powers, the amount of the debts, the extent of the financial difficulties and the prospects of recovery, plus the particular circumstance of the claim and the extent to which the member has departed from the standards of the reasonable man in regard thereto." [3]

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[1] "*64. Liability for reckless or fraudulent carrying-on of business of corporation*

(1) If it at any time appears that any business of a corporation was or is being carried on recklessly, with gross negligence or with intent to defraud any person or for any fraudulent purpose, a Court may on the application of the Master, or any creditor, member or liquidator of the corporation, declare that any person who was knowingly a party to the carrying on of the business in any such manner, shall be personally liable for all or any of such debts or other liabilities of the corporation as the Court may direct, and the Court may give such further orders as it considers proper for the purpose of giving effect to the declaration and enforcing that liability."

[2] **2008 (6) SA 585 (SCA)**

[3] *Supra*, para 14

19. The court held further that the transfer to the CC of the plaintiff's debt from another CC without any *quid pro quo* showed reckless disregard for the CC's solvency, for its ability to repay the debts it incurred and for its capacity as a legal entity to accumulate and preserve assets of its own. [4]

20. In ***L & P Plant Hire BK en Andere v Bosch en Andere*** [5] the Supreme Court of Appeal elucidated the use of the terms *"reckless"* on the one hand and *"gross negligence"* on the other hand. Essentially the court held that reckless conduct in Section 424 of the Companies Act (the equivalent Section to Section 64 of the Close Corporations Act) has been interpreted to mean gross negligence. Therefore when Section 424 of the Companies Act is said to include conduct which evinces the lack of genuine concern for the prosperity of the Company, such views can also be accepted as correct as regards to grossly negligent conduct in Section 64 of the Close Corporations Act. [6]

21. In ***Philatex (Pty) Ltd and Others v Snyman and Others; Praitex (Pty) Ltd and Others v Snyman and others*** [7], after examining authorities, the court

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[4] *Supra*, para 18 at 593b

[5] **2002 (2) SA 662 (SCA)**

[6] *Supra*, para 39 at 677 F-H; see also Henochsberg, Commentary on the Close Corporations Act, Vol 3, Com-187, Note 64.1

[7] **1998 (2) 138 (SCA)**

held that the ordinary meaning of "*recklessly*" includes gross negligence, with or without consciousness of risk taking.[8]

22. The effect of fraud or recklessness is that the person so guilty will be personally liable for the debts of the CC.[9]

23. In relation to the provisions of s 424 of the Companies Act our courts have held that proof of a casual link between the relevant conduct and the debts or liabilities in respect of which a declaration of personal liability is sought is not required.[10]

24. However, in ***Saincic v Industro-Clean (Pty) Ltd* 2009 (1) SA 538 (SCA)**, at para 20[11], Farlam JA stated that the absence of such a link is a factor to be taken into account by the court in the exercise of its discretion whether to grant the relevant declaration. In the same case, Harms JA, making reference to the *dicta* in *L&P Plant Hire BK v Bosch* (*supra*) at paras 39 and 40 in relation to the provisions of s 64 of the Close Corporations Act ("the Act"), drew a distinction between creditors and members of the corporation.

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[8] Supra, p143 at paras C - F

[9] ***Ebrahim*** supra at para 15 where Cameron JA stated: "[T]he section retracts the fundamental attribute of corporate personality…with its corollary of autonomous and independent liability for debts…"

[10] ***Philotex*** supra at 142, para H; ***Nel NNO v McArthur* 2003 (4) SA 142 (T)** at 155-156; ***Kalinko v Nisbet* [2002] 3 All SA 294 (W)** at 303.

[11] 2009 (1) SA 538 (SCA), at para 20

25. The learned Judge was of the view that that when it came to creditor's claims the section should be interpreted restrictively so as to apply only where the result of the relevant conduct is that it has a negative effect on the creditor's claim against the corporation.

26. The interpretation by Henochsberg[12] is that in order to sustain a cause of action there must be at least some link between the conduct complained of and the inability of the company to pay the debt claimed.

Piercing the corporate veil

27. Lifting the corporate veil means disregarding the dichotomy between a company and a natural person behind it and attributing liability to that person where he has misused or abused the principle of corporate personality.[13]

28. The law is not settled when it comes to the circumstances under which it is permissible to pierce the corporate veil and each case involves a process of enquiring into the facts.[14]

29. The courts will generally require an element of fraud or other improper conduct before they will pierce the corporate veil.[15] In these circumstances a

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[12] Henochsberg at Com-188(2), 64.3, middle of the paragraph

[13] ***Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd*** **1995 (4) SA 790 (A)**

[14] Supra, p802, para H

[15] Ibid, p803, paras D-G, where the court quoted with approval from ***The Shipping Corporation of India Ltd v Evdomon Corporation & Another*** **1994 (1) SA 550 (A)** per Corbett CJ at 566C-F:

court will then be entitled to look to substance rather than form in order to arrive at the true facts.[16] The court does not require "*unconscionable injustice*" for determining whether the veil should be pierced as formulated in ***Botha v Van Niekerk***[17] and found it perhaps too rigid a test.[18] The court opted for a more flexible approach allowing the facts of each case ultimately to determine whether the piercing of the veil is called for.

30. There is no reason why piercing of the corporate veil should necessarily be precluded if another remedy exists. As a general rule if a person has more than one legal remedy at his disposal he can select anyone of them and he is not obliged to pursue the one rather than the other. If the facts of a particular case otherwise justify piercing the veil the existence of another remedy and the failure to pursue it available remedy should not in principle serve as an absolute bar to a court granting relief. [19]

'It seems to me that, generally, it is of cardinal importance to keep distinct the property rights of a company and those of its shareholders, even where the latter is a single entity, and that the only permissible deviation from this rule known to our law occurs in those (in practice) rare cases where the circumstances justify "piercing" or "lifting" the corporate veil. And in this regard it should not make any difference F whether the shares be held by a holding company or by a Government. I do not find it necessary to consider, or attempt to define, the circumstances under which the Court will pierce the corporate veil. Suffice it to say that they would generally have to include an element of fraud or other improper conduct in the establishment or use of the company or the conduct of its affairs. In this connection the words "device", "stratagem", "cloak" and "sham" have been used. . . .'

[16] Ibid, p803, paras I-J.

[17] 1983 (3) SA 513 (W) at 525 F

[18] Ibid, p805, para E

[19] Ibid, p805 G – I.

31. Existence of another remedy or the failure to pursue it may be a relevant factor when policy considerations come into play but cannot be of overriding importance.[20]

32. Where assets are transferred from one entity to another with an improper purpose – evasion of legal obligations in mind - the court has shown its willingness to pierce the corporate veil.[21]

33. Smalberger J A held[22] that

"a company, otherwise legitimately established and operated, is misused in a particular instance to perpetrate a fraud, or for a dishonest or improper purpose, there is no reason in principle or logic why its D separate personality cannot be disregarded in relation to the transaction in question (in order to fix the individual or individuals responsible with personal liability) while giving full effect to it in other respects. In other words, there is no reason why what amounts to a piercing of the veil pro hac vice should not be permitted. "

34. Agreements can be declared invalid if they are in conflict with public policy.[23]

35. The case of ***Footwear Trading CC vs Mdlalose***[24], before Nicholson JA in the Labour Appeal Court, is particularly instructive and whereas the relief sought was different, the facts are similar to the present case.

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[20] Ibid
[21] Ibid, page 804 F – I/J.

[22] Ibid, page 804 C-D

[23] ***Sasfin (Pty) Ltd v Beukes*** **1989 (1) SA 1 (A**) at 8A – C.

36. The respondent was dismissed. She referred her dispute to the CCMA, obtained an award in her favour, and asked for her employer, Fila (Pty) Ltd, to pay her the compensation as awarded. Fila declared that it was dormant as a company and that Footwear Trading had taken over certain of its assets. The respondent sought an order declaring Footwear and Fila to be co-employers and as such jointly and severally liable to comply with the award. Footwear filed an answering affidavit stating that Fila was a separate juristic entity and that it merely performed administrative functions for Fila.

37. The court *a quo* found that Footwear was jointly and severally liable with Fila for complying with the order.

38. On appeal the Labour Appeal Court upheld the principle that if circumstances warrant it a court will be justified in regarding a company as a separate personality in order to fix liability elsewhere for what are extensively acts of the company.[25] This is referred to as lifting or piercing the corporate veil. In determining whether or not it is appropriate to lift the veil in the given circumstances the court quoted with approval from ***Dadoo Ltd & Others vs Krugersdorp Municipal Council***[26]*,* where the court confirmed the fundamental doctrine that the law in these circumstances will have regard to the substance rather than the form of things.

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[24] **[2005] 5 BLLR 452 (LAC),**
[25] **Footwear** supra at 457J – 458B
[26] **1920 AD 530**

39. Nicholson JA went on to say that the general principle underlying the lifting of the corporate veil is that when a corporation is the mere alter ego or business conduit of a person it may be disregarded.[27]

40. While the corporate veil is normally lifted to identify the shareholders or individuals who are the true perpetrators of a company's acts, the court extended the principle to situations where companies and close corporations are juggled around like "*puppets to do the bidding of the puppet master*."[28]

41. The willingness of our courts, and in particular the Industrial and Labour Courts, to pierce the veil is not new and there have been a number of decisions in the old Industrial Court as well as more recently in the Labour Court that have upheld the principle:

    41.1 Substance and not form is determinative.[29]

    41.2 The liquidation of a close corporation and the simultaneous creation of a second one to take its place was a deceptive device used to get rid of the workforce without having to retrench them.[30]

    41.3 In another instance it was held that the business of a close corporation was so enmeshed with that of the respondent company

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[27] **Footwear** supra at 459D

[28] Ibid, at 459E

[29] ***Camdons Reality (Pty) Ltd & Another v Hart*** **(1993) 14 *ILJ* 1008 (LAC)**

[30] ***PPWAWU v Lane NO. as trustee of Cape Pallet CC (in liquidation) & Another*** **(1993) 14 *ILJ* 1366 (IC).** The court in this case was prepared to hold the reconstituted close corporation liable for the dismissal of the employees, imputing to it the responsibilities of Section 197.

that the respondent could be regarded as the real employer of the applicant.[31]

41.4 It is not necessary for the purposes of establishing an employment relationship formally to pierce the corporate veil.[32]

APPLICATION OF THE LAW TO THE FACTS

42. Acting recklessly consists of a failure to give consideration to the consequences of one's actions. Quickelberge acted recklessly, and I am persuaded, fraudulently. He knew, or ought to have known about the CC's debt and transferred assets in order to frustrate the claim of a creditor (Zeman).

43. The effect of fraud or recklessness is that the person so guilty will be personally liable for the debts of the CC, and Quickelberge, as the sole member of the CC and the signatory on behalf of the CC for the "sale" to the Family Trust is personally liable. Knowing as he did of the debts, or in a context where he should have known about the debts, he falls foul of s 64 of the Act as acting either fraudulently or carrying on the business of the CC recklessly and should, as Mr *Ackermann* submitted, be held personally liable for its debts.

44. The "sale" to the Family Trust of the CCs assets was an abuse of the separate corporate personality of the CC with the intent to frustrate Zeman in

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[31] ***Viljoen v Wynberg Travel (Pty) Ltd NH*** **11/29388 (unreported – referred to in Current Labour Law) (1993)** at 8.

[32] ***Board of Executors Ltd v McCafferty*** **[1997] 7 BLLR 835 (LAC)**

her claim against the CC. It was a disposition intended to defraud a creditor (Zeman), it was without value (the so-called “prior loan agreement”), false guarantees were given by Quickelberge that no third party claims existed against the CC knowing that there were such claims or where he ought to have known that there were such claims, and there was a puppet master (Quickelberge) pulling the strings behind the scenes (the “special” arrangement whereby the CC/restaurant could use the assets sold to the Trust). The result of this conduct was that it had a negative effect on a creditor’s claim (Zeman) against the CC.

45. There was a causal link between the conduct complained of (the sale of assets by the CC to the Trust) and the inability of the CC to pay the debt.

46. This Court is entitled to look at substance and not form in exercising its discretion. The substance of the agreement is to avoid payment of a debt to a creditor. Where assets are transferred from one entity to another with an improper motive such as the evasion of a legal obligation, our courts have shown their willingness to pierce the corporate veil.

47. Quickelberge knew that the attachment of the CC’s assets were immanent because he had failed to satisfy a court order. To avoid his legal obligations he transferred assets from one entity (CC) to another entity (the Family Trust).

48. In these circumstances, I find that the corporate veil should be lifted and Quickelberge must be held personally liable for the debt of the CC to the applicant – one that it has steadfastly avoided, despite the existence of an arbitration award in the applicant’s favour.

COSTS

49. The applicant asked for costs to be awarded on an attorney client scale. In support of that prayer, Mr *Ackermann* referred me to ***Cape Pacific Ltd v Lubner Controlling Investments*** where Smalberger JA awarded costs on an attorney and client scale: [33]

"….as a mark of this Court's disapproval of his [defendant's] conduct in refusing to give effect to the judgment in the original action when he was in a position to do so, and thereby compelling the appellant to again come to Court in order to enforce its rights, it would, in my view, be appropriate and just to award the appellant its trial costs on an attorney and client scale."

50. Mr *Ackermann* submitted that the facts of this matter justify an order of attorney client cost. He noted the following facts:

    50.1 Quickelberge's actions generally speak of a man who considers himself above the law. The manner of Zeman's dismissal was crass and without any regard to Quickelberge's obligations as the employer representative of the CC. She was simply told to get off his property. There was not the slightest attempt to follow any sort of procedure as laid down in law. As much was stated in the arbitration award.

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[33] **Cape Pacific** *supra* at p807, paras C-D

50.2 The Commissioner also found in the arbitration award that Quickelberge had made unauthorised deductions from Zeman's salary in the amount of R19 318, 00.

50.3 Zeman deposed under oath that she was afraid to return to work after Quickelberge had her away from the workplace because she had previously witnessed him assaulting an employee.

50.4 Quickelberge's actions and in particular his successful attempts to date at avoiding his legal obligations have caused Zeman money, trouble and distress.

51. Finally Mr *Ackermann* submitted that regard should be had to the fact that Quickelberge is a wealthy individual. The evidence before me shows that he owns property in excess of R20 million. And if regard is had to the facts as a whole, his attempts at voiding paying what for him is a trifling some of money, makes his behaviour all the more tractable for sanction by means of a punitive cost order.

52. As a general proposition, I was persuaded by these arguments. It appeared clear to me that Quickelberge fraudulently attempted to evade his obligations to the applicant by hiding behind a translucent corporate veil. But it bothered me that the applicant was being represented *pro bono*. Would it, in law and fairness, be proper to award costs generally, much less on an attorney and client scale?

53. I asked Mr *Ackermann* to present me with supplementary heads of argument regarding this vexed question. I am indebted to him for his assistance.

54. There have been a number of contradictory judgements in this regard but recently in an unreported judgment in this Court, costs were awarded to a *pro bono* client.

55. Cele J in his judgment in ***Lorna Naude v BioScience Brands Ltd***[34] held:

> *The applicant was represented on a pro bono basis. The considerations of law and fairness of this matter suggest that a costs order should issue against the respondent. There is no specific provision in the rules of this court for the awarding of costs in these circumstances. Rule 40 of the High Court provides for a costs order for a successful litigant in forma pauperis.*

56. In this respect I respectfully agree with Cele J that, in appropriate cases, a *pro bono* litigant may be awarded costs, and disagree with the contrary view taken in *Morkel NO & others v CCMA & Others* [35]. In litigation the *pro bono* client is at a disadvantage. As between attorney and client, the attorney for the *pro bono* litigant can only claim such expenses from the client as are actually incurred by the attorney. It has been argued that since his client has incurred no fees, the attorney acting *pro bono* can claim no fees, only disbursements, from the losing party.

57. The problem with this view is that it enables the opposing party to litigate with impunity, discourages settlement, and militates against public interest.

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[34] C 842/08, 11 March 2010, unreported at paragraph 89

[35] C397/07, 11 November 2008, unreported.

58. In addition it is unfair. Nothing constrains the opposing party from obtaining a cost order against a *pro bono* client.

59. The argument that because the *pro bono* litigant has incurred no costs and does therefore not need to be indemnified for his costs, is, as Mr *Ackermann* argued, ill-founded. As a point of departure it must be stated that there is no rule or law that states that a pro bono litigant may not recover costs. In fact, the opposite is true.

60. There is precedent, in the rules of court, legislation, and comparative case law, that supports the contention that a court can, and in fact should, award costs to a *pro bono* litigant.

Rule 40 of the High Court

61. Rule 40 of the High Court Rules dealing with *in forma pauperis* instructions does make provision for cost orders in favour of a litigant who is being represented free of charge. Rule 40(7) states as follows:

> *"If upon the conclusion of the proceedings a litigant in forma pauperis is awarded costs, his attorney may include in his bill of costs such fees and disbursements to which he would ordinarily have been entitled…"*

Magistrates Court Rule 53 (5)

62. This rule, though not exactly the same as the High Court rule, also places the indigent litigant on equal footing with his opponent by not depriving him of a cost order.

"If the pro Deo litigant succeeds and is awarded costs against his opponent he shall, subject to taxation, be entitled to include and recover in such costs his attorney's costs and also the court fees and sheriff's charges so remitted and if he shall recover either the principal amount, the interest or the costs, he shall first pay and make good thereout pro rata all such costs, fees and charges."

63. Clearly a *pro bono* litigant cannot, by means of a cost order, be placed in a better position than she was. She cannot profit from litigating by means of a cost order for costs she did not incur. I am persuaded that the intention behind these rules of court are to enable the attorney to recover costs without, at the same time, his *pro bono* client being out of pocket. The only way this can be done is if the attorney invoices his *pro bono* client for the amount he, the attorney, actually recovers from the other side. If for example, he is unable to recover anything, he is duty bound to write off the notional fees which he would ordinarily have earned.

The Attorneys Act

64. Law clinics, under the Attorneys Act, also enjoy the advantage of being able to recover costs, even though their clients are not charged. Section 79A of the Act states as follows:

"79A. Recovery of costs by law clinics.—(1) Notwithstanding the provisions of section 83 (6) of this Act and section 9 (2) of the

> Admission of Advocates Act, 1964 (Act No. 74 of 1964), whenever in any legal proceedings or any dispute in respect of which legal services are rendered to a litigant or other person by a law clinic, costs become payable to such litigant or other person in terms of a judgment of the court or a settlement, or otherwise, it shall be deemed that such litigant or other person has ceded his or her rights to such costs to the law clinic.
>
> …
>
> (3) The costs referred to in subsection (1) shall be calculated and the bill of costs concerned, if any, shall be taxed as if the litigant or person to whom legal services were rendered by the law clinic, actually incurred the costs of obtaining the services of the attorney or advocate acting on his or her behalf in the proceedings or dispute concerned.
>
> [S. 79A inserted by s. 20 of Act No. 62 of 2000.]

65. The notion therefore of awarding costs to a litigant who is being represented free of charge, is not alien in our law, and in fact express provision, as illustrated above, has been made in both legislation and the rules of court in order to level the playing field.

66. The Legal Practice Bill, currently before Parliament, envisages a similar provision. Although it is not yet law and may not become law in its present form, I do think it is instructive. It provides (in draft form) as follows:

"Whenever in any legal proceedings or in any dispute in respect of which legal services are rendered free to a litigant or other person by a legal practitioner, costs become payable to such litigant or other person in terms of a judgment of the court or a settlement, or otherwise, such litigant or other person must be deemed to have ceded his or her rights to the costs to that legal practitioner or practice…

The costs … must be calculated and the bill of costs, if any, must be taxed as if the litigant or person to whom legal services were rendered by the legal practitioner actually incurred the costs of obtaining the services of the legal practitioner acting on his or her behalf in the proceedings or dispoute concerned."

Comparative case law

67. Jurisprudence in the United States has developed to the point where *pro bono* awards are routinely made in favour of *pro bono* litigants, even where there is no fee arrangement between attorney and client.

68. In ***Jose Henriquez v Anna S Henriquez*** [36] in the Appeal Court of Maryland, the Court held as follows:

> *"We are aware that indigents are represented by legal services attorneys in a large number of family relation matters. It would be unreasonable to allow a losing party in a family relations matter to reap the benefits of free representation to the other party……..."*

[36] No. 1774 September term 2007, in the Court of Special Appeals of Maryland.

69. In coming to this conclusion the court relied not only on its own interpretation of the relevant statute allowing for "reasonable attorney's fees" but quoted with approval from a Supreme Court of Montana decision[37] in the matter of ***In re: Marriage of Malquist***. In ***Malquist*** the court noted that the *"principle of providing equal justice to all"*[38] warrants the award of attorney's fees to persons represented by legal services organisations or a pro bono attorney.

70. Instructive is that the court held that *"whether a party incurs debt is irrelevant…"*[39]

71. In the case of ***Benavides v. Benavides***[40] the court added further policy considerations for allowing attorney's fees for pro bono counsel:

> *"…It would be unreasonable to allow a losing party in a family relations matter to reap the benefits of free representation to the other party. A party should not be encouraged to litigate under the assumption that no counsel fee will be awarded in favour of the indigent party represented by public legal services…Furthermore a realization that the opposing party, although poor, has access to an attorney and that an attorney's*

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[37] *In re: Marriage of Malquist* 880 P2D1357, 1364 (MONT. 1994)

[38] Ibid, at 1364

[39] Ibid.

[40] 526 A.2d 536, 537 (Conn. App. Ct. 1987).

fee may be awarded deters non-compliance with the law and encourages settlements."[41]

72. The Court in the ***Henriquez*** matter based its decision on a line of similar matters.[42] The Court held that where a party is represented by a non-profit legal services organisation or a pro bono attorney, he is entitled to recover costs irrespective of whether a fee agreement exists between the client and the attorney.

Arguments against the notion of awarding a pro bono litigant costs

73. One of the arguments generally taken is that an attorney who agrees to act *pro bono* should not be entitled to recover fees for his services, as it would nullify his *pro bono* service, and possibly incentivise attorneys to take on matters on a contingency (no win-no fee) basis under the guise of performing *pro bono* service.

74. Mr *Ackermann* proffered two answers to this objection. Firstly, it is to be encouraged if attorneys can recover fees from the losing party in matters where they agreed initially to act without any prospect of recovering fees. It would promote *pro bono* service rather than detract from it. That in fact was one of the very reasons the Contingency Fees Act (Act 66 of 1997) was passed. Secondly, there is little risk that attorneys will act *pro bono* in the

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[41] Ibid, at 154-155.

[42] *Ward*, 3 Cal. App. 4th at 624; *In re Marriage of Swink*, 807 P.2d 1245, 1248 (Colo. Ct. App. 1991); *Lee v Green*, 574 A.2d 857, 860 (Del. 1990); *Brockett*, 474 N.E.2d at 756; *Hale v Hale*, 772 S.W.2d 628, 630 (Ky. 1989); *Gaddis*, 632 S.W..2d at 329; *Miller v. Wilfong*, 119 P.3d 727, 730 (Nev. 2005).

hope of recovering fees by stealth, as it were, on successfully concluding a matter.

75. If a losing litigant pays the legal costs occasioned by the lawsuit, it may make it easier for attorneys to take on more *pro bono* matters, and indeed encourages them to do so.

76. Legal costs are usually recovered from the losing party on a scale as between party and party, and it is common knowledge that the prescribed tariff of fees is well below what attorneys actually charge their (paying) clients. Attorneys are unlikely to take on *pro bono* cases in the hope of winning costs on a scale as between party-and-party. In any event, even if this happened, the purpose of pro bono assistance will still be served in that an indigent client will have been afforded access to justice. The point of *pro bono* service is to provide access to justice to those who cannot afford it otherwise, not to focus on whether the legal representatives of the *pro bono* client profits or not. It is this misplaced focus that has bedevilled the issue of whether a pro bono litigant can recover costs.

77. In my view, access to justice to indigent clients should be encouraged, especially in a court of equity such as this one. Should a successful *pro bono* litigant be awarded costs, the unsuccessful party is no worse off than would otherwise be the case. The obverse is also true: A *pro bono* litigant still runs the risk of an adverse costs order against him or her. The knowledge that a losing party – usually the employer – would never run the risk of an adverse costs order, would have a chilling effect on the willingness of legal practitioners to provide their services *pro bono.*

CONCLUSION

78. I make the following order:

78.1 It is declared that the business of the second respondent was, and continues to be, carried on in a manner which was intended to defraud the applicant within the meaning of section 64 of the Close Corporations Act, Act 69 of 1984.

78.2 The first respondent is personally liable for the debt owed by the second respondent to the applicant.

78.3 The first respondent is ordered to pay the applicant the sum of R39 000, 00 together with *mora* interest thereon calculated from 21 December 2007 until date of payment.

78.4 The first respondent is ordered to pay the applicant's costs on an attorney and client scale.

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AJ STEENKAMP

Judge of the Labour Court

Cape Town

Date of hearing:	13 August 2010
Date of judgment:	23 August 2010
For the applicant:	LW Ackermann
	Edward Nathan Sonnenbergs