

(Digital Audio Recording Transcriptions)/aj

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 12800-2016

DATE: 2017-03-17

(1)	REPORTABLE: YES / NO	
(2)	OF INTEREST TO OTHER JUDGES: YES/NO	
(3)	REVISED.	
	19-04-2017	
	DATE	SIGNATURE

In the matter between

DREAM SETS PTY LTD

Appellant

and

McCRAE, ROBERT ANDREW

First Respondent

McCRAE, LEAH-ANN

Second Respondent

STRIKE PRODUCTIONS (Pty) Ltd

Third Respondent

(In Liquidation)

ELOOF, HENDRIK JOHANNES TJAART N.O

Fourth Respondent

BEETGE, JOHANNES JURIE N.O.

Fifth Respondent

MUTHANYI, JOSHUA N.O.

Sixth Respondent

STANDARD BANK LIMITED

Seventh Respondent

JUDGMENT

SIWENDU J: This matter came before me on 13th March 2017 for the consideration of the application launched by the applicant for an order as set

out in the Notice of Motion, I need to note for all counsel present that at the end of the hearing, I had raised a narrow question to the applicant, relating to the application of Section 424 provisions of the Old Companies Act to the relief sought. In addition, I had indicated that I would reserve judgment.

Upon consideration, the matter should have stood down for the Ex Tempore judgment to today, because the matters before me are crisp and do not warrant that judgment be reserved. I also need to note that certain Supplementary Heads of Argument were filed flowing from the questions that I had raised, and including an amendment to the applicant's Notice of Motion.

I have considered all the Supplementary Heads of Argument and submissions made, and, unless parties feel compelled to make representations, I am of the view that having heard counsel during argument, read the papers filed on record, and, also considered and read the supplementary Heads of Argument's filed as well as the authorities that, as would be apparent, the judgment can safely be rendered as determined.

The applicant Dream Sets seeks an order declaring that the 1st and 2nd Respondents are personally liable for the debts of the 3rd Respondent, Strike Production, specifically, the liability of Strike Productions to Dream Sets. The Notice of Motion states that the 1st and 2nd Respondents should be ordered to pay jointly and severally, the amounts as stated in the Notice of Motion. For ease of reference, the claim relating to costs is referred to as claim 2, and, the Claim relating to the disputed amount is referred to as Claim 1.

The Notice of Motion also states that the order is sought in terms of Section 424 of Act 61 of 1973. I refer to this as the Old Companies Act read

together with Item 9(1) and (2) of Schedule IV of Act No 71 of 2008, which I refer to as "the New Companies Act". In the alternative the Applicant seeks a remedy in terms of Section 20(9)(a) of the New Companies Act and prays that Strike Productions be deemed not to be a juristic person, in respect of the obligations and or liabilities of the 3rd or 1st Respondent as shareholder thereof, in that the 1st and 2nd Respondents be held personally liable and be ordered to pay all the debts and liabilities, specifically claim 1 which relates to the disputed amount, and the costs of liquidation of Strike Production to the Applicant, jointly and severally. (I think I didn't pick this up with the applicant. I believe there is an error in the Notice of Motion to the degree that the piercing of the corporate veil related to the reference to the 3rd Respondent. It should have been 1st and 2nd, I believe. But be that as it may). The alternative remedy sought relates to the piercing of the corporate veil, and under this provision, where there has been use of the corporate entity for improper purpose, dishonesty or fraud. It nevertheless has been held that it is the remedy of last resort to be exercised in exceptional cases, unless the complainant has no other remedies.

If there are, the complainant must avail himself to those. In this regard, I refer to the decision of *Hulse-Ruetter v Godde* 2001 (4) SA 1336 (SCA). This relief was not pursued with vigour during the hearing and accordingly has not been considered for the purposes of this judgment. Dream Set cited the 3rd to 7th Respondent because of their interest in the matter. They have not opposed the application.

As background, there is a protracted history of litigation between the

parties. It is common cause on the papers that the 1st and 2nd Respondent were married to one another, but subsequently divorced even though they still maintain a common home. Dream Sets alleges there is suspicion that the divorce is one of convenience. In 2002 Dream Sets was engaged by the 2nd Respondent as an in house set builder for events, functions and productions managed by Strike Productions. A dispute ensued between Strike Productions and Dream Sets in respect of invoices rendered for work undertaken.

Dream Sets instituted an action against Strike Production in September 2010 under case number 10/38437. This action is pending before this court. Claim 1 for which Dream Sets seeks to hold the 1st and 2nd Respondents personally liable is the subject of the pending litigation proceedings. The claim is in respect of services rendered, goods and equipment supplied and delivered to Strike Productions, as well as for the manufacture, sourcing and construction of stage sets.

On 4th June 2014 Strike Productions was finally liquidated at the instance of Dream Sets. It appears that the reason for seeking the liquidation of Strike Production was that it was deemed to have failed or neglected to meet demand made on it, in terms of Section 345(a)(ii) of the Old Companies Act. Strike Productions had failed to pay the taxed legal costs obtained against it in interlocutory applications arising from the pending litigation proceedings referred to above. Section 345 provides for the winding up of a company in circumstances where it is unable to pay its debts.

The final order for liquidation of Strike Productions was granted by Judge Mali on 4th June 2014. Prior to the granting of the final order there

had been an attempt to wind up Strike Productions voluntarily. This process remained inchoate and was superseded by the final order of 4th June 2014. While much was made on the papers of the two liquidation processes, in my view nothing much turns on this, as the final liquidation order was never set aside by the 1st or 2nd Respondents.

In any event our law recognises as a means of enforcing payment, two nevertheless distinct remedies, a liquidation of a debtor on the one hand or a recovery of a debt through an action or application proceedings on the other. Reference can be had to *Meskin, Insolvency Law and its Operation in Winding Up (Insolvency Law) Para 2.1 p2-1*.

I now turn to the case in respect of the 1st Respondent. Dream Set alleges that from 1st October until 19th November 2010 the 1st Respondent was the director of Strike Productions. Even though he resigned, he nevertheless continued to manage the business of Strike Productions until its final liquidation on 4th June 2014. In the realisation of the assets of Strike Productions for the purposes of liquidation, assets found were of limited value and did not satisfy the claim or claims proved.

A Resolution was taken at a meeting of creditors to search and investigate the assets. Strike Productions had submitted a claim in the amount of R1.153.550 with the liquidators which was approved. An asset register of Strike Productions received by the liquidators from the 1st Respondent in November 2012 and an inventory of assets dated 14th July 2014 also received from the 1st Respondent showed a disparity in the values of the assets by an amount of R1.261.210.

Dream Sets alleges that this indicates a deliberate urgent dissipation

of assets of Strike Productions. Dream Sets alleges that one of the most valuable assets in the form of equipment belonging to Strike Productions was sold by Tropical Plant Displayz to a third-party Sound Harmonic [indistinct] at the instance of the 1st Respondent. Tropical Displays is an entity controlled by the 1st Respondent's cousin. This raised suspicion and the 1st and 2nd Respondents were summonsed in terms of Section 64 of the Insolvency Act of 1936 for interrogation under Section 65.

The transcript of the interrogation proceedings conducted on 7th September 2015 duly certified by the Master of the High Court, reveals certain admissions by the 1st Respondent, namely that Tropical Plants Display, an entity controlled by the 1st Respondent's cousin was used as a conduit to sell the equipment at a time when Strike Productions had ceased trading, evident in an invoice issued by Tropical Plants Displayz on 19th April 2013.

It was represented to the buyer that the equipment belonged to Tropical Plants Displayz. This was false. The sale proceeds were eventually transferred to the 1st Respondent's personal bank account. The 1st Respondent confirmed the use of his personal bank account as a channel. He testified that it was to avoid and or circumvent the defrayment of the funds received towards an overdraft which had been overdrawn.

The reason advanced was that because Strike Productions account was overdrawn, the cash flow was needed to pay salaries, creditors and other outgoings of Strike Productions. The Applicant alleges that the use of the funds was to deplete Strike Productions of all assets to the prejudice of the general body of creditors and to defraud creditors. The Applicant further

avers that the 1st Respondent's action which was conceded by the 1st Respondent at the interrogation, had the effect of preferring other creditors over others as certain creditors were paid by the 1st Respondent.

The above appears not to have been a single transaction, but part of a series of transactions to different third parties. The 1st Respondent had undertaken to provide the details of a list of creditors of Strike Productions, contact details of Tropical Plants Displays, amongst others and had failed to do so.

In so far as the case in respect of the 2nd Respondent is concerned, the case advanced against the 2nd Respondent is that she was a director of Strike Productions from October 2009 and at all material times, when the assets were sold. Her liability flows from her position as the director of Strike Productions. As against both the 1st and 2nd Respondents it is alleged that the business of Strike Productions was carried on recklessly with gross negligence or with the intent to defraud creditors.

The 1st and 2nd Respondents were knowingly parties to the carrying on of the business of Strike Productions therefore. In the alternative, it is alleged that their conduct constituted a gross abuse of the juristic personality and separate entity. The court should voice its displeasure by granting a punitive costs order against the 1st and 2nd Respondent.

At the hearing of the application Mr Van Beek for the 1st Respondent sought the leave of the court to file Supplementary Heads of Arguments, which was granted. It is noted in the Supplementary Heads that the amount due in respect of claim 2, which is in respect of the legal costs, for which Strike Productions was liquidated had been paid, alternatively, payment was

formally tendered. An electronic mail dated 13th March 2017 confirming the payment was handed in at court.

The three defences mounted by Mr Van Beek for the 1st Respondent are namely that (1) *Of lis alibi pendens*, in view of the pending and defended proceedings until case number 38437-10. There is no dispute that the litigation involves the same parties based on the same cause of action in respect of the same subject matter. (2) The second defence is that of Dream Sets' lack of *locus standi*. It was submitted that its *locus standi* in the application must be called into question for two reasons, namely: that, Dream Sets has been paid what is due, and also that if it were to fail in the pending proceedings and given the dispute of facts pertaining to the claim still to be adjudicated, it cannot be said that Dream Set is a creditor as envisaged in Section 424. (3) The third defence is in respect of the pending claim as well as the validity of the liquidation proceedings respectively.

Mr Norwitz on the other hand on behalf of the 2nd Respondent argued for the dismissal of the application against her. He submitted that the Applicant relies on a single transaction. There has been no case made out on the papers against the 2nd Respondent that justifies a declaratory order against her. The fact of her holding the office of directorship in Strike Productions was not sufficient to hold her personally liable.

He argued that Dream Sets needs to show that the 2nd Respondent knew or was party to the transaction complained of, or transactions complained of. It was submitted that that, she had been a member of Tropical Plants Displayz, the entity used to channel funds to the 1st Respondent's bank account for no longer than a day is of no moment. He

submitted that the relevance of the pending action is that Dream Sets does not merely seek a declarator, but seeks compensation in respect of the pending action. Claim 1 has always been in dispute.

In addition to the above he aligned his argument with that of the 1st Respondent and submitted that Dream Sets is not a creditor of Strike Productions. He submitted that until the issues in the pending dispute are resolved, the application is premature. The argument raised in respect of the Applicant's *locus standi* to bring the application is premised on Section 424 of the Old Companies Act which states:

'When it appears whether it be in a winding up, judicial management or otherwise that any business of the company was or is being carried on recklessly or with intent to defraud creditors, or creditors of any other person or for any fraudulent purpose, the court may on application of the Master, the Liquidator, the judicial manager, any creditor or member contributory of the company 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.'

It was submitted, correctly that, to succeed in the application, the Applicant must show that it is a creditor of the 3rd Respondent in terms of this provision.

A curious matter arose during argument as in my view, the Applicant,

was that the Applicant had premised its case on an obsolete provision of the Companies Act, in that Schedule IV Item 9 (1) and (2) of the Companies Act only applied to the winding up and liquidation process and proceedings. Personal liability of directors was regulated by other provisions of the New Companies Act.

I was of the view that Section 424 on which Dream Sets based its application for personal liability of directors was not imported into the New Company Law regime and cannot be read together with Schedule IV. In view of this Mr Niewenhuizen moved an application to amend Dream Sets Notice of Motion, to align the application with Section 22 and Section 218 of the New Companies Act.

In addition, supplementary Heads of Argument were filed by him in support of the application of Section 424 together with the decision by Acting Deputy Judge President Tsoko J in *Alliance Mining Corporation Limited (In Liquidation) & Others vs De Kok* 48387/11 dated 8th February 2013. The fresh amendment to the Notice of Motion seeks a separation of the question of quantum of the 3rd Respondents to a trial. The application to amend the Notice of Motion to accord with the New Act was resisted by Mr Norwitz and Mr Van Beek.

Mr Norwitz submitted that if Dream Sets relies on the breach of the provision of a statute, it must spell out chapter and verse the provisions it relies on. Nevertheless the 1st and 2nd Respondents also filed additional supplementary Heads of Arguments resisting the amendment and the interpretation offered. They were also given an opportunity to address the court in respect of the amendments, however it was not deemed necessary

to do so.

As will be evident below, based on the facts of this case, having regards to the arguments advanced during the hearing and the defences raised, it is not necessary to resolve the interpretation issues in terms of the application of the Old Companies Act and the New Companies Act in these proceedings. Nevertheless, the following legal principles need restating. It is no longer business as usual for company directors. The expected corporate conduct is set out in Section 22(1) of the New Companies Act.

"A company must not carry on its business recklessly with gross negligence, with intent to defraud any person or for any fraudulent purpose "

In my view, despite the prohibition being placed on the company, the agency directors, prescribed officers and managers have as the brains, arms and legs of and over the affairs of the company underpins the provisions of the New Companies Act. The standard of conduct expected of directors as well as circumstances under which directors will be held personally liable to and for the debts of the company are spelt out in Sections 76 and 77 of the New Act respectively. Relevant to this case is Section 77(3)(b) as well as Section 77(3)(c). It is stated that:

'Any director of a company is (I add) personally liable for any loss, damages or costs sustained by the company as a direct or indirect consequence of the director having acquiescence in the carrying on of the company's business despite knowing that it was being conducted in a manner prohibited in Section 22(1) of the Act.'

In respect of Section 77(3)(c) it states that:

'Being party to an act or omission by the company despite knowing that the act or omission was calculated to defraud a company creditor, employee or shareholder or for another fraudulent purpose attracts personal liability stated

In addition to the above provisions a right of action is available to affected parties in terms of Section 218(2) which states that:

'Any person who contravenes any provisions of this Act is liable to any other person for any loss or damage suffered by that person as a result of that contravention.'

In my view the right of action in Section 218(2) has been cast wider than that provided under Section 424. It has been made available to shareholders, creditors and affected parties. It must and is recognised that there may be parties who have a direct or an indirect interest in the proper running of the affairs of the company who may be affected by the conduct of its affairs beyond creditors and shareholders. Notwithstanding a direct or indirect interest would need to be shown to exist.

It is anticipatory of disputes of facts that may arise in such matters and is compatible with action proceedings as opposed to application proceedings to the degree that the section refers to "a right of action" under the heading, civil action. When compared, Section 424 which refers to an intent to defraud, while Section 73 requires an act or omission calculated to defraud.

The facts giving rise to a potential personal liability of the 1st

Respondent were admitted during the interrogation and conceded during the hearing. Mr Van Beek however submitted that the channelling of the funds was not intended to defraud creditors, but to keep cash flow to get by. He submitted further that the 1st Respondent will be held liable for the conduct not relevant to the applicant's claim. This may be so if reliance is solely placed on the Old Companies Act.

In my view on the papers the conduct of the 1st Respondent is a *prima facie* breach of the standard expected of a director and of Section 77. and it is a *prima facie* breach of a standard expected of a director at common law, motives excepted. Nevertheless, in my view, the allegations and proof of an intention to commit fraud or to defraud creditors (if reliance is placed on the Old Companies Act) or actions calculated to defraud (if reliance is placed on the New Companies Act) are tri-able issues which cannot be fairly determined on the papers. As the matters stand, they call for an answer from the 1st Respondent.

In so far as 2nd Respondent it was argued by Mr Niewenhuizen that she ought not to be supine in the role as a director. This may be so, however the facts supporting her liability whether in respect of actual or putative knowledge were not clearly set out, other than that she held the office of director and other circumstantial facts. This on its own is not sufficient.

I am mindful that in stating so, I do not intend to set the bar high that it is out of reach in holding directors and officers accountable, as in the matters of this nature, an Applicant may not have full knowledge of all the internal workings of the company even though it may suffer the consequences of the malfeasance. The allegations in this case are however

not sufficient to enable the court to grant the declaratory order sought against the 2nd Respondent.

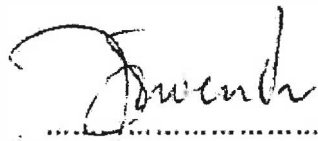
In addition to the above the nature and the extent of the interest of Dream Sets in the light of the payment received as well as the pending proceedings has been cast in doubt. The ability to recover and hold directors personally liable as stated in Section 218 requires that the loss must have been proved. The loss in respect of claim 1 has not been established and it is subject to a pending dispute. Significantly the remedy sought by Dream Sets in the original Notice of Motion is not merely a declarator alone.

It has been combined with a compensatory remedy or relief, all of which were treated as a composite. The *mero motu* question raised by the court did not entitle the Applicant to seek to amend the very nature of the relief it had sought. The question is purely related to that of legality and the application of the provisions of the Act.

Whilst the court is vested with a discretion whether to stay proceedings or to hear a matter despite the earlier pending proceedings, given the factual dispute, the dispute pertaining to the counterclaim, the finding of a *prima facie* case against the 1st Respondent, means there remains a case to answer by both the 1st and 2nd Respondent for the affairs of Dream Sets notwithstanding that the applicant has not succeeded in these proceedings. In my view, it is in the interest of justice and such interests demand that all the matters forming the subject of this application are best pursued in the pending action to avoid multiplicity of actions. It is just and equitable, for finality and convenience that the matter is not adjudicated piece meal.

In my view the questions of personal liability of both the 1st and 2nd Respondents can best be ventilated in the pending trial proceedings together with the extent of the liability or quantum. In the result, I make the following order:

The application cannot succeed and is dismissed with costs.


.....
SIWENDU J
JUDGE OF THE HIGH COURT
DATE: 19-04-2017