REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.
28/06/2019
DATE
SIGNATURE

CASE NO: 25988/2017

In the matter between:

MEATWORLD FACTORY CC Plaintiff

-and-

E.T. TRADING HOUSE (PTY) LTD First Defendant

NICOLA ENGLEZAKIS Second Defendant

JUDGMENT

De Kok, AJ

INTRODUCTION

1. The plaintiff alleges that in March and April 2015 it sold and delivered

to the first defendant two consignments of pork spareribs ("**the goods**") for an agreed purchase price of R886 266.78. It alleges that the first defendant returned some of the goods on 7 May 2015 and was credited with the price relating to the returned goods in an amount of R210 408.66. The balance of the purchase price, being R675 858.00, was not paid by the first defendant.

2. The plaintiff now seeks to recover this amount from both the first defendant and the second defendant. It was common cause at the trial that the second defendant was at all times the first defendant's only director, as well as being its only shareholder and in charge of its management.

3. As against the first defendant the claim is a simple contractual claim for the purchase price of goods sold and delivered. As against the second defendant the plaintiff bases its claim on the provisions of section 218(2) of the Companies Act, 71 of 2008.[1]

THE CLAIM AGAINST THE FIRST DEFENDANT

4. It is convenient to deal firstly with the claim against the first defendant.

5. The first defendant was placed under business rescue and supervision pursuant to a resolution passed on 26 May 2015. The

---

1 I will refer to this Act as "**the Act**" and to the Companies Act, 61 of 1973 as "**the 1973 Act**".

plaintiff alleges in its particulars of claim that the business rescue proceedings had come to an end prior to the institution of the action, alternatively that the business rescue practitioner had consented to the institution of the action in terms of s 133(1)(a) of the Act.

6. The first defendant has formally withdrawn its defence to the claim against it and was unrepresented at the trial.

7. In the circumstances Mr Goslett, on behalf of the plaintiff, moved for judgment by default against the first defendant. Such judgment is reflected in the order below.

THE EVIDENCE

8. The plaintiff called six witnesses: Ms Karina Rodrigues, the plaintiff's accounts manager; Mr Eduardo Porrageiro, the plaintiff's receiving manager of frozen foods; Ms Anina Botha, a facilitator employed by Cavalier Foods; Mr Peter Mentz, the business rescue practitioner; Ms Christa Kruger, employed in the plaintiff's accounts department, and Mr Anthony Baxter, the plaintiff's marketing and sales manager.

9. The evidence of Ms Rodrigues, Mr Porrageiro and Ms Kruger was seemingly adduced to establish the debt of the first defendant to the plaintiff.

9.1. None of these witnesses had any personal knowledge of the

terms of the sale agreement(s) and essentially only confirmed that the relevant invoices and credit note had been produced by them.

9.2. Mr Porrageiro testified also as to how the quantities of the goods returned were calculated.

9.3. Given that the second defendant admitted receipt by the first defendant of the goods in his plea, that he did not challenge the plaintiff's claim during the business rescue proceedings and that there was no challenge in cross-examination to the purchase price as reflected in the invoices, I find that the plaintiff has proven, as against the second defendant, that the first defendant is indebted to it in the amount of R675 858.00.[2]

9.4. Ms Strathern, on behalf of the second defendant, nonetheless argued that the plaintiff's claim against the first defendant is precluded by s 154(2) of the Act. The section provides that:

"*If a business rescue plan has been approved and implemented in accordance with this Chapter, a creditor is not entitled to enforce any debt owed by the company*

---

2 The defendants' pleaded defence in relation to the sale of the goods was that all of the goods had been returned to the plaintiff. This was not pursued in cross-examination of any of the plaintiff's witnesses and no evidence was led by the second defendant in support of the pleaded version.

immediately before the beginning of the business rescue process, except to the extent provided for in the business rescue plan."

Leaving aside the issue of whether the plaintiff's claim against the second defendant can properly be construed as the enforcement of a debt owed by the first defendant, the evidence regarding the business rescue plan, with which I deal below, in any event made provision for the plaintiff's claim against the first defendant to be paid in full. S 154(2) therefore does not preclude the plaintiff's claim, whether against the first defendant or the second defendant.

10. Ms Botha's evidence does not take the matter any further. She testified that she acts as a "*facilitator*" . She was contacted by the second defendant to enquire whether she knew of anyone wishing to sell pork spareribs. Some two weeks later she was contacted by Mr Pereira of the plaintiff who enquired whether she knew of a buyer of pork spareribs. She gave the second defendant's telephone number to Mr Pereira and had no further involvement in the transaction.

11. Mr Baxter testified that as a result of Ms Botha's advice that the first defendant was looking to buy pork spareribs he made contact with the second defendant. The latter told him that his "*loads were delayed*" and enquired whether "*we can help him with two loads.*" Mr Baxter was asked how the credit note came about. His evidence was that

after delivery of the goods were made he followed up as regards payment. The second defendant told him that the first defendant was going through a "*rough time*" financially, but was expecting a payment which would enable the first defendant to settle the debt to the plaintiff. As Mr Baxter was under pressure from Mr Perera he agreed with the second defendant that the first defendant should return, for credit, those goods which the first defendant had not yet on-sold. This led to the return and the credit note.

12. Mr Baxter's evidence did not cast any light on the date of conclusion and terms of the sale agreement(s). His evidence appears to imply that there was only one sale agreement, entailing two separate deliveries. This agreement must have been concluded prior to the date of the first delivery (on 25 March 2015) but it is not apparent from his evidence how long prior to this date it was concluded.

13. Mr Baxter's evidence also did not cast any light on whether the goods were sold for cash, or on credit. In this regard:

    13.1. The plaintiff's pleaded case is that the purchase price of the goods became due and payable on date of delivery of the goods, being respectively 25 March 2015 and 9 April 2015;

    13.2. The invoices produced however reflect, under the heading "*Terms*", "*14 Days*".

14. Mr Mentz was appointed as business rescue practitioner to the first defendant on 2 June 2015.

14.1. He first became involved in the affairs of the first defendant when he was requested to attend a meeting with a Mr Diener (a liquidation practitioner), the first defendant's accountant and the second defendant on 30 March 2015. According to him the purpose of the meeting was for Mr Diener to advise the first defendant whether liquidation proceedings or business rescue proceedings were appropriate. His presence at the meeting was apparently aimed at establishing whether he would accept an appointment as a business practitioner, if the first defendant went the route of business rescue.

14.2. Mr Mentz's evidence does not reflect what information regarding the first defendant's financial position was conveyed to him and Mr Diener at the meeting of 30 March 2015, nor what Mr Diener's advice to the first defendant was. This is peculiar, since it seems highly unlikely that Mr Diener would have been able to give advice, and Mr Mentz would have been able to consider accepting an appointment, if they had not been told anything regarding the first defendant's financial position at the time.

14.3. Mr Mentz's narration again picks up, some two months later, when, on the 26th of May 2015:

14.3.1. the first defendant resolved to voluntarily commence business rescue proceedings in terms of s 129 (1) of the Act; and

14.3.2. the second defendant deposed to an affidavit as envisaged in s 129(3)(a).

14.4. Since the plaintiff relies heavily on the content of the second defendant's affidavit, I reproduce the relevant content in full. The second defendant stated:

"*4. The Applicant was established during 1980 as a wholesale and retail enterprise.*

6. Since establishment the Applicant operated in a wholesale industry, inter alia importing and selling ribs to the wholesale trade. During this time a contract was negotiated with the Spur restaurant group to supply wholesale ribs pre-packed and in accordance with their requirement to different outlets, nationwide.

7. For purposes of supplying the Spur group we had to establish a specialized infrastructure and the capital outlay was substantial.

8. The Applicants(s) main core business then changed

from wholesale to the public to supplying ribs to the Spur group. The Applicant was tied and entered into a contract/agreement with the Spur group to supply ribs according to their standards at a fixed rate.

9. *The problem arises as we supplied vast volumes of ribs which was imported to the different Spur outlets at a loss due to the variation in the Rand/Dollar exchange rate.*

10. *We then encountered severe financial difficulties in meeting our financial obligations towards overseas suppliers. This obviously resulted in our supply chain being prejudiced affecting our contract with the Spur group.*

11. *Finally, when Humeat, one of our main suppliers failed to supply us timeously and defaulted with their supplier agreement towards us, the Spur group terminated our contract and the Applicant was removed from the preferred vendors list.*

12. *The applicant's income was drastically reduced and cash flow severely hampered. This now resulted in a situation that the Applicant is now back in the wholesale trade to the public.*

13. *At a meeting with the Spar group a new contract is in the process of being negotiated with the prospect of a nett value of R3 000 0000.00 (Three Million Rand) additional income per month. This is over and above the approximate monthly turnover of R1 000 000.00 (One Million Rand) presently.*

14. With this positive prospects for the future, the Applicant will be in a financial position given time to resolve its financial difficulties which are off a temporary nature under the supervision of a business practitioner with the necessary powers to finalize the agreement with the Spar group in conjunction with the director.

15. The Applicant fits the criteria set forth in Section 129 read with Section 128 of the Act and represents a perfect candidate for business rescue proceedings as it is currently suffering cash flow constraints which may result in Applicant not being able to pay all its liabilities as they become due and payable within the ensuing six months."

14.5. Thereafter Mr Mentz was involved in convening meetings of creditors. Unsecured claims of R4 182 361.80 were proven (excluding a claim of R6 million by the second defendant, which he apparently agreed to subordinate in favour of other creditors). This included the plaintiff's claim of R675 585.12. A secured claim of R2 709 553.20 by the Bank of Athens and a secured claim of R293 360.69 by Wesbank were also proven.[3]

14.6. On 1 October 2015 a requisite majority of the creditors adopted a business rescue plan. This plan envisaged that an

---

3 The Wesbank claim was secured by certain movable assets. Mr Mentz was unable to clarify what the nature of the Bank of Athens' security was.

amount of R400 000.00 would be available per month to be shared between all creditors and that they would be paid in full within a period of two years.

14.7. After the business rescue plan was adopted, Mr Mentz, on 2 October 2015, filed a notice of substantial implementation as envisaged in s 132(2)(c)(ii) of the Act. He adopted the position that because of the "*substantial implementation*" of the plan the business rescue proceedings had terminated and he did not testify as to any further involvement in the affairs of the first defendant. When asked whether anything came of the rescue plans his response was that he could not answer.

14.8. The position adopted by Mr Mentz is clearly incorrect. S 132(2)(c)(ii) provides that business rescue proceedings end when a business rescue plan has been adopted in terms of part D of Chapter 6 "*and the business practitioner has subsequently filed a notice of substantial implementation of that plan*". The plan adopted envisaged that all creditors would be paid in full. It is common cause that the plaintiff was not paid any amount. There could therefore have been no suggestion (and certainly not on 2 October 2015) that the plan had been "*substantially*" implemented.

14.9. Other than the fact of the meeting on 30 March 2015 referred to above, and the bank statements referred to below, Mr Mentz's evidence did not cast light on the financial position of the first defendant as at the time when the first defendant ordered and/or took delivery of the goods. The plaintiff did not adduce any evidence of the first defendant's financial statements, management accounts or other accounting records. There is thus no indication as to what the first defendant's assets and liabilities were as at late March 2015 or early April 2015. Mr Mentz's evidence does not reflect that he undertook any independent investigation into the state of the first defendant's financial affairs as at March and April 2015.

14.10. Mr Mentz referred to statements in respect of the bank account held by the first defendant with First National Bank ("**FNB**") for the period of 28 February 2015 to 31 July 2015. For the relevant months, the statements show regular activity by way of credits and debits. For the month of February 2015 the statements show credits of R1 401 448.27 and debits of R1 411 646.09, for the month of March 2015 they show credits of R1 856 546.06 and debits of R1 842 047.49, for the month of April 2015 they show credits of R715 032,35 and debits of R748 894.22 and for the month of May 2015 they

show credits of R952 082.62 and debits of R947 974.21. In June 2015 the credit transactions drop to R122 296.92, with debit transactions of R112 332.79. At no stage do the statements show a debit balance. Mr Mentz was unable to say whether the first defendant held an overdraft facility with FNB or held any other bank accounts.

15. The second defendant closed his case, without leading any evidence.

THE PLAINTIFF'S CLAIM AGAINST THE SECOND DEFENDANT

16. The plaintiff's particulars of claim is not a model of clarity.

17. Shorn of repetition, the plaintiff alleges that:

17.1. At all material times the business of the first defendant was carried on recklessly and/or with the intent to defraud creditors and/or fraudulently.

17.2. S 77(3)(b) of the Act, as read with s 22 "*penalizes and holds the second defendant, personally liable, to the first defendant, for any loss occurred through knowingly carrying on the business of the first defendant, recklessly, with gross negligence, with intend to defraud any person or for any fraudulent purpose.*"[4]

---

4 Para 21.1 of the amended particulars of claim.

17.3. In terms of ss 22, 77(3) and 218(2) of the Act, the second defendant is liable for any "*loss or damage suffered by the plaintiff.*"

18. In argument, counsel for the plaintiff disavowed any reliance on fraud. He confined the plaintiff's case to the assertion that the second defendant acquiesced and participated in the first defendant carrying on its business recklessly. It was argued that this brought the second defendant within the ambit of s 218(2) of the Act.

19. The section provides:

"*218 Civil actions*

(2) *Any person who contravenes any provision of this Act is liable to any other person for any loss or damage suffered by that person as a result of that contravention.*"

20. On an ordinary grammatical interpretation, liability in terms of s 218(2) entails three elements:

20.1. a "contravention" of a provision of the Act;

20.2. loss or damage suffered;

20.3. as a result of the contravention.

21. As to the first element, a person can only be said to have contravened a provision of the Act if he or she acts in breach of a positive or

negative obligation imposed on him or her in terms of the Act. The second element requires a quantification of the loss or damage. The third element requires a causal relationship between the loss or damage claimed and the contravention.

The contravention

22. The plaintiff seeks to find the second defendant's contravention in s 22, as read with s 77, of the Act.

22.1. S 22 reads:

"22 Reckless trading prohibited

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

22.2. S 77(3) reads (in relevant part):

"77 Liability of directors and prescribed officers

(3) A director of a company is liable for any loss, damages or costs sustained by the company, as a direct or indirect consequence of the director having-

(b) Acquiesced in the carrying on of the company's business knowing that it was being conducted in a manner prohibited by section 22(1)."

23. S 22, in its express terms, prohibits a company from trading recklessly or with gross negligence. S 77(3)(b), in its express terms, imposes liability on a director for loss sustained by the company as a result of the director acquiescing in conduct prohibited by s 22(1).

24. The plaintiff contends that s 77(3)(b) should be read as prohibiting a director from permitting reckless trading by the company.

25. It finds support in the decision of du Plessis AJ in **Rabinowitz v van Graan**[5].

25.1. The judgment was given pursuant to an application for leave to amend the plaintiff's particulars of claim. The defendants objected to the amendment on the basis that it would render the particulars of claim excipiable. The learned Judge accordingly dealt with the matter as on exception.

25.2. Du Plessis AJ found that a third party can hold a director personally liable for acquiescing in "*or knowing about*" conduct that falls within the ambit of s 22(1).[6]

25.3. The ratio of the judgment, as I understand it, is that given that s 162(5)(c)(iv)(bb) compels the court to declare a director who acts in the manner contemplated in s 77(3)(b) a

---

5 2013 (5) SA 315 (GSJ)
6 At para 22

delinquent director and that s 77(3)(b) renders a director who acquiesces in the carrying of the company's business, despite knowing that it was being conducted in a manner prohibited by s 22(1), liable to the company[7], the Act must be interpreted as prohibiting a director from acquiescing in conduct that falls within the ambit of s 22(1). The learned Judge found it inconceivable that the legislature intended to prohibit a company from trading recklessly, but did not intend to also prohibit its directors from so acting.[8]

26. In **Sanlam Capital Markets (Pty) Ltd v Mettle Manco (Pty) Ltd**[9] Vally J appears to have considered the plaintiff's reliance on s 77(3)(b) as being misplaced (but without referring to the decision in **Rabinowitz**). He held that, on exception, the plaintiff's averment that the defendants' breach of their duties as set out in s 76(3) of the Act had caused it to suffer a loss as envisaged in s 218 constituted a valid cause of action.

27. The decision in **Rabinowitz** was referred to with approval in **Chemfit Fine Chemicals (Pty) Ltd t/a SA Premix v Maake**[10] and **Motor**

---

7 Du Plessis AJ also took into account the criminal liability created by s 214(1)(c) . That section however only criminalises conduct "*calculated to defraud a creditor or employee of the company, or a holder of the company's securities, or with another fraudulent purpose.*" It does not criminalise the reckless conduct of business *per se.*

8 At para 21

9 [2014] 3 All SA 454 (GJ)

10 [2017] ZALMPPHC 27 (1 September 2017) at para 35. The learned Judge also considered it of "*cardinal importance*" that s 214(1)(c) imposes criminal liability for acquiescing in "*conduct prohibited by Section 22(1)*" (at para

Industry Bargaining Council v Botha.[11]

28. The judgments referred to above were handed down before the judgment of the Supreme Court of Appeal in **Gihwala v Grancy Property Ltd**.[12] In that matter the plaintiff had advanced a claim in terms of s 424 of the 1973 Act and, in the alternative, under s 77(3) of the Act. As to the latter, the court held :

> "*That section, in this departing from s 424, does not involve a declaration by the court, but creates a statutory claim in favour of the company against a director, imposing liability on the latter for any loss, damages or costs incurred by the company in certain circumstances, including where the director acquiesces in the company engaging in reckless trading. It is not a provision that can be invoked to secure payment to a creditor or shareholder in respect of their claim against the company or a director. So the attempt to rely on s 77(3) must also fail.*"[13]

29. On behalf of the plaintiff it was argued that **Gihwala** was distinguishable in that in that case the plaintiff had relied on s 77(3) as a self-standing cause of action, had not relied on s 218 as read with s 77(3) and that the decision in **Rabinowitz** was therefore still good law. I am not convinced that the distinction is a valid one. As set out above, the *ratio* in **Rabinowitz** appears to be that s 77(3) should be

---

28.4). As set out in note 7 above, s 214(1)(c) is in fact limited to fraudulent conduct.

11 [2016] ZAGPPHC 615 (10 June 2016). The decision is distinguishable in that the learned Judge considered that fraudulent conduct had been proven (at para 69).

12 2017 (2) SA 337 (SCA)

13 At para 120

read as an implied prohibition of a director participating or acquiescing in the company conducting itself in the manner prohibited by s 22(1). The Supreme Court of Appeal's interpretation of s 77(3) limits its effect to the creation of a statutory claim by the company against its directors. I will however assume in favour of the plaintiff that the decision in **Gihwala** has not overruled that in **Rabinowitz** and that I remain bound by the latter, unless I consider it clearly wrong.

30. Since neither s 22(1) nor s 77(3) expressly prohibits a director from participating or acquiescing in the reckless conduct of the business of the company, the question arises whether such a prohibition is to be implied in either of the two sections.

31. The Constitutional Court has held that words cannot be read into a statute by implication unless the implication is a necessary one in the sense that without it effect cannot be given to the statute as its stands. In addition such implication must be necessary in order to realise the ostensible legislative intention or to make the legislation workable.[14] This approach is, in my view, not inconsistent with the general principles of statutory interpretation as set out in **Natal Joint Municipal Pension Fund v Endumeni Municipality**[15], which entails

---

14 **Bernstein v Bester NO** 1996 (2) SA 751 (CC) at para 105, approving the *dicta* in **Rennie NO v Gordon NNO** 1988 (1) SA 1 (A) at 21E and **Palvie v Motale Bus Services (Pty) Ltd** 1993 (4) SA 742 (A) at 749C

15 2012 (4) SA 593 (SCA) and as confirmed by the Constitutional Court in, *inter alia*, **Road Traffic Management Corporation v Waymark Infotech (Pty) Ltd** 2019 (6) BCLR 749 (CC) at paras 29-32

the objective process of attributing meaning to words used in legislation. The process entails a simultaneous consideration of (a) the language used in light of the ordinary rules of grammar and syntax; (b) the context in which the provision appears and (c) the apparent purpose to which it is directed.

32. The ostensible legislative purpose of the Act includes:

32.1. to "*promote the development of the South African economy by - (i) encouraging entrepreneurship and enterprise efficiency; (ii) creating flexibility and simplicity in the formation and maintenance of companies; and (iii) encouraging transparency and high standards of corporate governance as appropriate, given the significant role of enterprises within the social and economic life of the nation"* (s 7(b));

32.2. to "*reaffirm the concept of the company as a means of achieving economic and social benefits*" (s 7(d));

32.3. to "*create optimum conditions for the aggregation of capital for productive purposes, and for the investment of that capital in enterprise and the spreading of economic risk"* (s 7(g));

32.4. to "*balance the rights and obligations of shareholders and directors within companies*" (s 7(i));

32.5. to "*encourage the efficient and responsible management of companies"* (s 7(j)); and

32.6. *to "provide a predictable and effective environment for the efficient regulation of companies"* (s 7(l)).

33. The purpose of the Act thus reflects a desire to balance the economic rationale for the recognition of companies as separate legal *personae*, with limited liability on the part of their owners, with the need to promote responsible corporate governance. How this balance is to be achieved is a matter of legislative choice.

34. That the imposition of personal liability on those controlling a company which trades recklessly would be a legitimate manner in which to promote the aim of good corporate governance, and to protect those dealing with a company, is no doubt so.[16] It is however not the only manner in which this object can, rationally, be achieved.

34.1. The legislature has, through item 9(1) of Schedule 5 of the Act, preserved the remedy of s 424 in the 1973 Act in respect of companies in liquidation. Given that any loss or damage which a third party may suffer as a result of reckless conduct will invariably also be recoverable from the company, the need for a right of recourse against the company's directors will, on a practical level, more often than not occur in the context of liquidations.

34.2. In the context of business rescue proceedings s 141(2)(c)(ii)(bb) provides that if the business rescue

---

16 The rationale for the imposition of personal liability on those in charge of an artificial person is considered, with reference to s 64(1) of the Close Corporations Act, 69 of 1984, in **Ebrahim v Airport Cold Storage (Pty) Ltd** 2008 (6) SA 585 (SCA) at para 16

practitioner finds any evidence of reckless trading in the dealings of the company before the business rescue proceedings began he or she must direct the management to take any steps to rectify the matter. This will include invoking the provisions of s 77(3)(b).

34.3. In order to achieve the aims of the Act the legislature has seen fit to create the sanction of declaring a director delinquent, on the basis *inter alia*, that he or she acquiesced in the company trading recklessly.[17]

35. In these circumstances the omission of the legislature to expressly prohibit a director from participating or acquiescing in reckless trading by a company, on pain of personal liability in terms of s 218, may very well have constituted a deliberate policy choice. In my view it cannot be said that absent such a prohibition the legislative intention becomes unrealisable or that the legislation is not workable.

36. Notwithstanding my reservations as to the soundness of the conclusion in **Rabinowitz**, I am bound by the decision unless I am satisfied that it is clearly wrong. Given the interpretational difficulties outlined above, I cannot be so satisfied.

37. I accordingly deal with the matter on the basis of an assumption that

---

17 The purpose of the delinquency remedy is dealt with in **Gihwala** *supra* at para 144

s 22(1) and/or s 77(3) impliedly prohibits a director from acquiescing or participating in the reckless conduct by a company of its business and that such acquiescence or participation would constitute a contravention of the implied prohibition potentially giving rise to liability in terms of s 218(2).

Has reckless conduct been proven

38. There is a considerable body of case law as to the meaning of recklessness in s 424 of the 1973 Act. Mr Goslett and Ms Strathern were agreed that I should have regard to these authorities in assessing whether there has been recklessness as envisaged in s 22(1) of the Act.

39. From the authorities relating to s 424 the following is apparent:

    39.1. Acting "recklessly" consists in an entire failure to give consideration to the consequences of one's actions. It entails an attitude of reckless disregard of such consequences. In the context of s 424, the court should have regard, amongst other things, to the scope of operations of the company, the role, power, functions and powers of the directors, the amount of the debts, the extent of the company's financial difficulties and the prospects, if any, of recovery.[18]

---

18 **Fourie NO v Newton** [2011] 2 All SA 265 (SCA) at para 29

39.2. The question of whether a company is unable to pay its debts when they are due (which is pertinent in assessing whether the company has conducted its business recklessly) is a question of fact decided as a matter of commercial reality:

"The situation must be viewed as it would by someone operating in a practical business environment. This requires a consideration of the company's financial condition in its entirety, including the nature and circumstances of its activities, its assets and liabilities and the nature of them, cash on hand, monies procurable within a relatively short time, relative, that it, to the circumstances of the company including the nature of its business, by the sale of assets, or by way of loan and mortgage or pledge of assets, or by raising capital."[19]

39.3. Participation in business necessarily involves entrepreneurial risks. The concept of reckless trading connotes the subjection of third parties to risk which is grossly unreasonable. If, when credit is incurred, a reasonable man of business would have foreseen that there was a strong chance, falling short of a virtual certainty, that creditors would not be paid, recklessness is established.[20]

39.4. The onus is upon the party alleging recklessness to prove it and to establish the necessary facts on a balance of

---

19 Per Goldstone JA in **Ex parte De Villiers and another NNO: IN re Carbon Developments (Pty) Ltd (in liquidation)** 1993 (1) SA 493 (A) at 504E-F

20 **Philotex Pty) Ltd v Snyman** 1998 (2) SA 138 (SCA) at 147 B-C

probabilities.[21]

40. As set out above, the plaintiff's pleaded case is not that the goods were delivered on credit. Its pleaded case is that the sale agreement(s) required payment on delivery. Why, if this was so, the plaintiff did not require payment at the time of delivery was not explored in the evidence.

41. The plaintiff adduced no evidence as to the first defendant's assets and liabilities as at late March 2015 and early April 2015. It relied solely on the content of the second defendant's affidavit deposed to on 26 May 2015, the meeting on 30 March 2015 and the statements of the first defendant's account with FNB.

41.1. As to the second defendant's affidavit:

41.1.1. The affidavit does not purport to deal specifically with the first defendant's financial situation as at late March 2015 and early April 2015.

41.1.2. On behalf of the plaintiff it was argued that the second defendant's affidavit should be read in the context of the second defendant's response to a request for further particulars in terms of which he indicated that to the best of his knowledge the

---

21 **Philotex** *supra* at 142 H-J

"*Spur Group removed the first defendant as a supplier off their suppliers list in February/March 2015.*"

41.1.3. However, the financial implications of the contract with Spur terminating are not clear on the evidence. Taking the second defendant's affidavit at face value, he indicates that the contract with Spur was a loss-making exercise, which had in effect caused the first defendant's financial woes. The affidavit reflects that subsequent to the termination of its contract with Spur it had again started to supply goods to the general public. What the state and prospects of this area of business activity was, as at late March 2015 and early April 2015, is not apparent from the evidence.

41.2. As to the meeting on 30 March 2015:

41.2.1. The plaintiff argued that from the fact of the meeting I should infer that the second defendant, at that time, considered that it was reasonably unlikely that the company will be able to pay all of its debts as they became due and payable within the next 6 months.

41.2.2. Assuming that this inference can properly be drawn, even in the absence of evidence as to the facts on which the first defendant sought advice from Mr Diener, it does not lead to the conclusion that the first defendant was reckless or grossly negligent in ordering the goods from the plaintiff (at some date prior to 25 March 2015). If, as it suggested by the evidence, the first defendant had a buyer for the goods, the sale may have been a way to trade out of its difficulties. It may of course also have been apparent that, notwithstanding this transaction, the company could not be saved and that there was a strong possibility that the plaintiff would not be paid for the goods. The point is that this is all speculation. Absent any evidence as to what the first defendant's assets, liabilities and prospects were as at the (unknown) date when the order was placed and on the dates of delivery, one cannot conclude that a reasonable director, in the position of the second defendant, would have concluded that there was a strong possibility that the plaintiff would not be paid.

41.3. As to the content of the statements in respect of the first

defendant's account with FNB:

41.3.1. They do not reflect, at face value, a clearly insolvent company.

41.3.2. The point that the plaintiff makes about these statements is that on no single day during the period of March 2015 to April 2015 did the first defendant have a sufficient credit balance in its FNB account to have paid, on that day, the debt to the plaintiff. I do not consider this a valid approach. It is never been held, as far as I know, that the fact that a company does not have, on any given day, a sufficient cash balance in its bank accounts to meet all of its current obligations on that day, that this connote reckless trading on the part of the company. The company's available cash resources, held on deposit with a bank, can only form part of the picture. Without any evidence as to what the company's trade debtors and other sources of funding and assets were at the relevant times, the bank statements do not, on their own, support a conclusion of reckless trading.

42. In the circumstances I find that the plaintiff has not proven that, in

ordering or accepting delivery of the goods, the first defendant conducted its business recklessly.

Has the plaintiff proven loss or damage as a result of the "contravention"

43. To the extent that I may be wrong in my assessment of the facts as to whether the plaintiff has proven that the first defendant's business was conducted recklessly, I deal with the issue of whether the plaintiff has proven that it suffered loss or damage in the amount claimed as a result of the such reckless conduct.

44. Unlike s 424 of the 1973 Act, the liability imposed in terms of s 218(2) of the Act is not for the debts of the company, but for loss or damage suffered. The terms loss and damage[22], in the ordinary meaning, connote a diminution of the plaintiff's patrimony.

45. The loss or damage claimed is described in the particulars of claim as follows: "*R675 858.00 ...being the sum not recovered from the first defendant.*"

46. The argument on behalf of the plaintiff is that the plaintiff's "*loss*" is the "*loss of*" payment of the contract price. This argument cannot be sustained. This "*loss*" is not one caused by the conduct complained

---

22 I can conceive of no legally significant difference between the two words, and none was suggested in argument.

of. In this regard the plaintiff's case, as pleaded and as argued, is not that, but for the recklessness complained of, it would have been paid the contract price. Its case is that but for the recklessness it would never have concluded the sale agreement(s). Any loss or damage suffered would therefore have been related to the market value of the goods supplied and not returned. It was not argued by the plaintiff that I could, or should, find that the market value of the goods equates to the contract price and such a contention is not alluded to in the pleadings.

47. The decision in **Motor Industry Bargaining Council v RF Botha**[23], on which the plaintiff relied in its supplementary heads of argument, does not assist it. In that case the recklessness complained of consisted of the company's failure to pay over to the plaintiff monies deducted from its employees' salaries and which were earmarked for, and due to, the plaintiff, but were instead used for other purposes.[24] In this case there is no suggestion, on the pleadings or the evidence, that the first defendant acted recklessly in not paying the contract price for the goods after the 25th of March 2015.

48. Additionally, it is entirely unclear on the evidence whether the first defendant is at present unable to pay the contract price to the plaintiff.

---

23 *Supra* note 11

24 At paras 64 and 65. To the extent that the learned Judge suggests in para 62 that the only difference between s 218(2) and s 424 of the 1973 Act is that of causation, I respectfully disagree. The concepts of "*loss*" and "*damage*" do not equate to "*the debts of the company*".

In this regard:

48.1. The Supreme Court of Appeal has held that the remedy in s 424 of the 1973 Act is only available where there is evidence that it is likely that the company would not be able to pay the debt.[25] The reasoning is explained in **Fourie v FirstRand Bank Ltd**[26] as follows:

"*...because s 424 was not intended to create a joint and several liability between the company and those responsible for the reckless conduct of its business, but rather to protect creditors against the prejudice they may suffer as a result of the business being carried on in that way. Logic dictates that unless the company is unable to pay, no such prejudice would follow. That does not mean that the plaintiff-creditor has to liquidate or excuss the company, but only that there must be evidence of the company's inability to pay.*"

48.2. S 218(2) similarly does not purport to create any joint and several liability. Moreover, unlike s 424, it is not concerned with the debts of the company, but rather with loss or damage suffered as a result of a contravention. Logically, and even assuming that an unpaid debt equates to loss or damage, such loss or damage will only be suffered if the company is

---

25 **L & P Plant Hire BK v Bosch** 2002 (2) SA 662 (SCA) at paras 39-40; **Saincic v Industro-Clean (Pty) Ltd** 2009 (1) SA 538 (SCA); **Fourie v FirstRand Bank Ltd** 2013 (1) SA 204 (SCA) at paras 28-29 and recently affirmed in **Gihwala** *supra* at para 119.

26 *Supra* at para 28

unable to pay the debt.

48.3. There is no evidence as to what the first defendant's current financial position is, and whether it is able to pay its debt to the plaintiff. As set out above, Mr Baxter adopted the attitude that after 2 October 2015 the first defendant was no longer under business rescue and he was unable to say what had become of the plans to rescue the business of the first defendant. As a result of Mr Baxter's attitude the business rescue proceedings notionally terminated on 2 October 2015, whereafter the first defendant was again able to trade without supervision. Whether it did so, and what is financial position is more than three and a half years later, one simply does not know.

49. I therefore find that the plaintiff has not proven that it has suffered loss or damage, in the amount claimed, as a result of the second defendant's contravention of either s 22(1) or s 77(3).

ORDER

50. In the result the following order is made :

50.1. Judgment is granted in favour of the plaintiff against the first defendant for payment of:

50.1.1. the amount of R675 858.00;

50.1.2. interest on the aforesaid amount at the rate of 9.5% per annum from 24 July 2017 to date of payment;

50.1.3. the plaintiff's costs of suit;

50.2. The second defendant is absolved from the instance;

50.3. The plaintiff is ordered to pay the second defendant's costs.

A DE KOK
Acting Judge of the High Court, Gauteng Local Division, Johannesburg

Date of hearing: 6 and 7 May 2019
Date of additional written submissions on behalf of the plaintiff: 10 May 2019
Date of judgment:

Appearances
For plaintiff: Mr R Goslett, instructed by Roxo Law
For first defendant: no appearance
For second defendant: Ms N Strathern, instructed by Manong Badenhorst Abbott van Tonder Attorneys