IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

19/05/2016

CASE NUMBER 26201/15

In the matter between

BURCO CIVILS CC Applicant

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

19/5/2016 .....

DATE SIGNATURE

and

ALIDA ADRIANA STOLZ First Respondent
WILLEM HENDRIK STEYN Second Respondent

JUDGMENT

THULARE AJ

[1] The Applicant seeks an order declaring the respondents personally liable for claims which creditors are unable to recover in the liquidation of Caveoplant (Pty) Ltd (Caveoplant).

[2] It is common cause that Caveoplant has been placed under final winding up in the hands of the Master of the High Court. Caveoplant is indebted to the applicant in the amount of R1 066 196-80. Despite notices in terms of section 345 of the Companies Act, 2008

(Act No. 71 of 2008) (the new Companies Act), Caveoplant failed and or refused to pay the amounts owed to the applicant. As a result, an application for the liquidation of Caveoplant was launched.

[3] The applicant, in anticipation of the liquidation, launched this application to protect its interests in terms of section 424 of the Companies Act, 1973 (Act No. 61 of 1973) (the Companies Act), alternatively in terms of section 218 (2) of the new Companies Act.

[4] The applicant alleges that, as a result of the material misrepresentations by the respondents, more specifically that the first respondent was authorized to act on behalf of Caveoprox (Pty) Ltd (Caveoprox) and that Caveoprox had sufficient funds to pay the applicant and other creditors, were they to let their equipment to Caveoprox, the applicant concluded an agreement, believing it to be with Caveoprox, in June 2014, in terms of which Caveoprox required plant from applicant to be let to EC Mining.

[5] The applicant alleges that it was advised by the first respondent, subsequent to the conclusion of the agreement, that Cavoeprox name have changed to Caveoplant with a new VAT number 4920266402, and that all suppliers, including applicant, were to ensure that the details were correct on all the invoices as from 1 August 2014, and that no invoices will be paid unless the correct details were on the invoice. The first respondent assured that it is only a name change as management and all services will still be done by herself.

[6] The applicant alleges that it subsequently established that:

(a) Cavoeprox and Caveoplant are two separate entities,

(b) Caveoprox has its own registration number, its own VAT number and is a well-established company, established in 2009. It has not changed its name to Caveoplant, and the sole director is a Mr Sittert who has been such a director

since 2010. It was not the entity that concluded the agreement with the applicant.

(c) Caveoplant has its own registration number and its own VAT number and was established during March 2014, approximately 2 months prior to the conclusion of the agreement between the applicant and the first respondent.

(d) The first respondent and/or her company or companies do not have sufficient funds to pay for equipment rented.

(e) The first respondent at all relevant times, was a director of Caveoplant and was never a director of Caveoprox.

[7] The applicant alleges that the first respondent carried on the business of Caveoplant recklessly and/or with gross negligence and/or with the intent to defraud among others, the applicant and/or for a fraudulent purpose.

[8] Over and above the misrepresentations referred to earlier in this judgment, applicant alleges that the first respondent entered into *inter alia* agreements with the applicant at a time when there was no reasonable prospect of honouring any monetary payment, that she failed or neglected to initiate business rescue proceedings, rely on the provisions of section 129 (7) of the new Act or to initiate liquidation proceedings when Caveoplant was under financial distress. As a consequence, the applicant alleges that the first respondent, during the business dealings between applicant and Caveoplant:

(a) did not act in good faith and for a proper purpose, and

(b) did not act in the best interest of Caveoplant and

(c) did not act with the degree, skill and diligence that may be reasonably expected.

[9] The applicant submits that the conduct set out above constituted the carrying on of the business of Caveoplant fraudulently and in contravention of sections 22 and 76 of the new Companies Act and that the first respondent was knowingly a party to that

conduct, that her conduct was fraudulent and in the premise, the first respondent is to be held personally liable to the applicant in terms of section 424 of the Companies Act, in the alternative, the first respondent is to be held personally liable to the applicant in terms of section 218 (2) of the new Companies Act.

[10] The applicant alleges that the second respondent also made himself guilty of the same conduct, and that in particular as Manager, he did not correct the first respondent when she introduced their company but instead brought the applicant under the impression that it was doing business with Caveoplant as an established company which had the means to pay the bills to the creditors. In addition, the majority of the requests for postponement in respect of payment was made by him. It is the applicant's view that he did not at all comply with the provisions of the Companies Act as stipulated alternatively he conducted the affairs of Caveoplant in a fraudulent manner and it is prayed that he be held personally liable for the debts of Caveoplant.

[11] The respondents oppose the application. The first respondent is the deponent of their opposing affidavit.

[12] Her allegations are that during or about July 2013 she and her husband, second respondent, identified a business opportunity to rent out earth moving equipment to mines. At the time, they did not own any such equipment and did not have a registered company. They envisaged themselves to be an earth moving equipment brokerage, hiring equipment and renting same to mines at a marked-up price.

[13] Time being of the essence, and her impression that it took long to register a company, together with her husband they approached friends of theirs, the Sitterts, who had a dormant company that was not trading, namely Caveoprox. The Sitterts agreed and authorized them to use Caveoprox to explore the business opportunity. Upon that

authorization and provision of company particulars and banking details by Mrs Sittert, Caveoprox commenced trading.

[14] The understanding with the Sitterts was that should the business opportunity prevail, she would register a separate company, together with an accompanying VAT number, to ensure that she became the director of a profit bearing company. It was not their intention, nor did they foresee that their conduct would be construed as unlawful. She takes exception to any allegation that their conduct was fraudulent.

[15] On 16 July 2014 Caveoprox obtained an order for the rental of earth moving equipment from an entity known as EC Mining. The deal was brokered by Jacques of a company known as Solefela Earthmoving CC in January 2014. The contact person at EC Mining was Vince Lategan, who contacted her on 10 June 2014. The respondents had no control over EC Mining.

[16] As part of the order EC Mining required two excavators, which Caveoprox leased from the applicant. At all relevant times the applicant was aware that Caveoprox acted as a broker and that the equipment was to be used by EC Mining. Accordingly Caveoprox made out an order to the applicant on 30 July 2014. The applicant was also informed of the intention to register. The applicant was also forwarded with EC Mining's particulars.

[17] The applicant delivered the Case 20 Ton Excavator (BR 18) and a Case 20 Ton Excavator (BR 03) to the site of EC Mining on 31 July 2014 and 11 August 2014 respectively.

[18] Thirty days after the equipment started operating on EC Mining site she would make out an invoice to EC Mining which would then become due and payable thirty days after delivery. This meant that a period of sixty days would lapse from the date on which Caveoprox would be paid and by which time it could pay its suppliers.

[19] During the sixty days period she endeavoured to obtain a VAT number for Caveoplant which she secured. After obtaining the VAT number, as initially envisaged from day one, she sent out a letter to all customers and all suppliers with the new company's details. At all relevant times she was *de facto* the contact and manager for both companies. The intention behind the letter was simply to ensure that payment be made to and from the correct entity.

[20] At no point was there an intention for her to mislead or defraud any customer or supplier. She is not a legally trained professional and did not intend nor foresee that her letter to customers and suppliers could be perceived as a misrepresentation or fraudulent. As intended, Caveoplant took over the operation of the existing agreements.

[21] The applicant had the opportunity to investigate the affairs and had the full choice to refuse or at the very least communicate with her in this regard. The applicant elected to accept the change. The applicant makes unfounded allegations in retrospect. The applicant was fully aware with whom and on what basis it was doing business. The applicant had knowledge of the fact that Caveoplant was to be registered and that same would take over the lease agreement.

[22] The first supplier invoice sent to the applicant on 31 August 2014 was from Caveoplant. Applicant replied on 10 September 2014 via e-mail with pro forma invoices made out to Caveoplant for August 2014. On 12 September 2014 the applicant requested an invoice for the night shift. Caveoplant sent an order on 19 September 2014. On 18 September 2014, afterreceiving first payment from EC Mining, Caveoplant paid over an amount to applicant. Applicant was aware of the factual position.

[23] EC Mining did not pay Caveoplant for the amounts due for the months of September and October 2014, in the sums of R884 995-91 and R700 899-47 respectively. This caused immediate cash flow constraints on the part of Caveoplant. On 18 November

2014 Vince Lategan from EC Mining informed her that due to problematic equipment breakdowns there would be delays in effecting payments. Without the equipment that broke down, known as 2 FEL's, production was at a minimum.

[24] Applicant had knowledge of the problems Caveoplant were having in obtaining payment. This is because there was also communication between applicant and EC Mining, which caused applicant, in the face of non-payment, to convince her to keep the equipment in site and not remove them from Harmony Mine where they were to be utilized. Applicant stopped operations on 20 December 2014.

[25] When EC Mining effected partial payment to Caveoplant, Caveoplant effected partial payment to the applicant.

[26] In January 2015 Caveoplant met with EC Mining where EC Mining assured that everything was fine and that they will be effecting payment over a period of eight months. EC Mining effected payments in January and February 2015, which Caveoplant used to partially pay its suppliers, including the applicant, immediately.

[27] Caveoplant ultimately instituted legal proceedings against EC Mining for the recovery of the outstanding debt. In the interim, it has been learnt that EC Mining has been liquidated. The prospects of recovering any amounts from EC Mining seem remote at best. EC Mining was Caveoplant's biggest client and after this, Caveoplant had no means with which to pay its credtors. The view is that Caveoplant has no remedy against the liquidation application, which informed the decision that Caveoplant would not oppose the liquidation application brought against it.

[28] The resolution of the applicant, attached to the applicant's papers on pages 20 and 21 and marked annexure "A" to the founding affidavit deposed to by Wiilem Hendrik Burger (Burger), does not authorise Burger to institute legal action against 2nd

respondent in his personal capacity for payment of all monies not recovered from Caveoplant in liquidation. It only authorizes him to take such actions and measures for the first respondent in her personal capacity. On that point of departure, applicant's motion against second respondent must fail.

[29] The respondents deny an intention to defraud, and to that end they allege that the applicant had background knowledge of and was aware of the relationship between themselves and Caveoprox, and that it was intended that Caveoplant would be established and take over from Caveoprox. The case of the respondents is that at the time, when he was made aware of the intention to register a new company, he did not have a problem.

[30] To take this aspect further, the applicant was served with the particulars of the new entity, Caveoplant, per letter, and advised to make invoices into the new names and VAT number. The respondent's case is that even at that stage, the applicant did not have any problems with the arrangement that was then in place. In furtherance of associating itself with the change of entity with whom it did business, it changed its billing documents accordingly. The Applicant itself took active steps to ensure that Caveoplant and not Caveoprox were being billed correctly.

[31] The case of the respondent is that the applicant, if it was not party to the then arrangement, could have easily investigated the affairs and even chosen to refuse to do business with an entity unknown to it, or at most sought a meeting to discuss the change. The applicant however accepted the change, which it knew was coming. The case of the respondent is that the applicant is making these unfounded allegations in retrospect, in other words, portraying a situation which looks good now as it is flavoured with the benefit of hindsight, but which does not reflect what the true position then.

[32] The respondent's case is further that the applicant was aware that Caveoplant was a broker, who had EC Mining as a main client. It was also aware that its earth moving equipment was being used by EC Mining at Harmony Mine, where it delivered the machinery. It was also aware of the route of payment, in that Caveoplant could only bill after the machinery had been working for 30 days on site, and that EC Mining would then have 30 days to pay that bill. In other words, a supplier in the applicant's position could only be paid by Caveoplant after 60 days.

[33] This knowledge was confirmed by the fact that when EC Mining started experiencing financial problems around September 2014 when the machinery in use experienced breakdowns, Caveoplant could not pay applicant as was to be. Applicant itself directly communicated with EC Mining around payment. Applicant was aware that Caveoplant could not pay them as a supplier because Caveoplant was not being paid by EC Mining, which could not produce because of breakdowns. The case of respondents is that the failure of EC Mining to remain in business had a ripple effect. It could not pay Caveoplant, which in turn could not pay applicant. If that be the case, the failure of Caveoplant to pay its creditors, including applicant, cannot be attributed to recklessness, negligence or any fraud on the part of Caveoplant or the respondents.

[34] The issue is whether the respondents contravened the provisions of section 22(1) and 76 (3) of the Companies Act, and if so, whether, in terms of section 218, the respondents are liable to the applicant for the loss suffered as a result of that contravention.

[35] In *Howard v Herrigel and Another NNO* 1991 (2) SA 660 (AD) at 664H -665B Goldstane JA said the following:

> *"The correct approach in a case such as the present was laid down by this Court in Tamarillo (Pty) Ltd v B N Aitken (Pty) Ltd* 1982 (1) SA 398 (A) at 430G-431A. *Miller JA said this:*

'A litigant is entitled to seek relief by way of notice of motion. If he has reason to believe that facts essential to the success of his claim will probably be disputed he chooses that procedural form at his peril, for the Court in the exercise of its discretion might decide neither to refer the matter for trial nor to direct that oral evidence on the disputed facts be placed before it, but to dismiss the application. (Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T) *at 1168.) But if, notwithstanding that there are facts in dispute on the papers before it, the Court is satisfied that on the facts stated by the respondent, together with the admitted facts in the applicant's affidavits, the applicant is entitled to relief (whether in respect of all his claims or one of them) it will make an order giving effect to such finding, with an appropriate order as to costs. (Cf Stellenbosch Farmer's Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 342 (C) at 235*; Burnkloof Caterers (Pty) Ltd v Horseshoe Caterers (Green Point) (Pty) Ltd* 1976 (2) SA 930 (A) at 938.*) The court does not exercise a discretion in motion proceedings whether or not to grant claims established by the admitted or undisputed facts; except perhaps in very extraordinary circumstances the applicant has a right to an order in respect of such established claims. (Rooms Hire case at* 1166.)"

[36] Section 218(2) which provides as follows:

"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."

[37] Section 22(1) provides as follows:

"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."

[38] Section 76(3) provides as follows:

"76. Standards of directors conduct. – ... (3) Subject to subsections (4) and (5), a director of a company, when acting in that capacity, must exercise the powers and perform the functions of director –

(a) In good faith and for a proper purpose;

(b) In the best interests of the company; and

(c) With the degree of care, skill and diligence that may reasonably be expected of a person –

(i) Carrying out the same functions in relation to the company as those carried out by that director; and

(ii) Having the general knowledge, skill and experience of that director."

[39] In determining whether the respondents can be said to be reckless or grossly negligent, we have to establish what that means in our law. In *S v Dhlamini* 1988 (2) SA 302 (AD) at 308D-E Steyn JA said:

"Gross negligence, in our law, both criminal and civil, connotes a particular attitude or state of mind characterized by an entire failure to give consideration to the consequences of one's actions, in other words, an attitude of reckless disregard of such consequences. See eg Rosenthal v Marks 1944 TPD 172 at 180; *S v Smith an Andere* 1973 (3) SA 217 (T) at 218D-F *and Bickle v Joint Ministers of Law and Order* 1980 (2) SA 764 (R) at 770D-E."

[40] *Henochsberg on the Companies Act, 71 of 2008,* in his discussion of recklessness, comments as follows:

"It is submitted, carrying on any business of the company recklessly means carrying it on by conduct which evinces a lack of any genuine concern for its prosperity."

Following Brand AJA as he then was, in *L & P Plant Hire BK en andere v Bosch en Andere* 2002 (2) SA 662 (SCA) at 678A-B at paragraph 40, when it comes to creditors, the interpretation of the provisions must be limited to apply to reckless or gross negligent conduct of business which have an adverse effect on the creditors' claims against the company.

[41] The respondents have demonstrated a lack of skill, and may have been out of place and chose an inappropriate route for the purpose of commencing their business operations. However, that lack of aptitude or their ineptitude, in my view, cannot be said to have amounted to using the business to incur obligations recklessly grossly negligent, as interpreted in our law. In my understanding, to carry on business recklessly or grossly negligent is to carry on business by conduct which evinces a lack of any genuine concern for its prosperity, which conduct has an adverse effect on the creditors' claims against the company.

[42] As regards fraud, in *R v Latib* 1973 (3) AD 982 at 984G-985B Steyn JA said:

"In a transaction on credit, the representation as to ability to pay is a representation by the purchaser of a present that he will be able to pay when payment falls due, rather than a representation as to what his financial condition will in fact be at a future date, if his belief is genuine, even though somewhat optimistic, the representation is not false, whatever his financial position may turn out to be at the due date. His ability to pay at the time of purchase and his prospects in relation to the date of payment, would, of course, be relevant to show whether or not he did in fact entertain such a belief, but what is placed in issue is a state of mind rather than a financial condition. The same applies in a cash transaction. The instant ability to

pay may there be of decisive importance, but even in such a transaction a buyer whose money has been stolen or who has inadvertently overdrawn his account at his bank, may unexpectedly find himself quite unable to pay for a purchase already concluded. That the representation here in question is primarily a representation as to the state of mind of the accused, appears from Rex v Persotam supra. In that case it was contended, upon an indictment in terms similar to this charge, inter alia that it did not allege a representation of present intention. In that connection Stratford, J.A., observed:

'The representation alleged is that the accused was 'able and willing to pay' on the day and place stipulated. In my judgment a representation of this kind can only mean 'I am bona fide in making this bargain, I intend to implement it'. The representation is the exact antithesis of saying 'I am mala fide – I have no intention of paying you'. I agree with the learned Judge, therefore, when he says that the allegation in the indictment 'at least involves a representation that the purchaser intends to meet the draft on presentation' ... The truth is that there is always an implied representation of good faith by the purchaser of the goods on credit."...

[43] It cannot be said, on the facts, that from inception the respondents were involved with a fraudulent scheme with a bogus company. Neither can it be said that from inception they had no intention that payment for the services ordered and received through them, to which applicant's claim relate, was ever to be made. In my view, it cannot be said that they were both unable, unwilling and did not intend to pay, when they concluded their agreements with the creditors, including the applicant. It follows that I am unable to find that the respondents conducted their business for a fraudulent purpose. There was never an indication, when they incurred credit, that the business will never be able to satisfy the claims of its creditors. The respondents genuinely believed in the success and prosperity of their business.

[44] The respondents in their papers indicate that applicant became aware of their non-payment by EC Mining, which applicant acknowledges. Most importantly, they allege that when they asked the applicant to remove its machinery from site, the applicant convinced them not to remove the machinery from site despite non-payment, and indicated utilization thereof irrespective of the lack of payment. All that the applicant says, in answer hereto, is that EC Mining was not a party to the applicant's agreement with Caveoplant. This in my view, indicates how cold aloof and unjustifiably removed from the reality applicant is.

[45] Furthermore, respondents indicate that they continued engagement with EC Mining, resulting in partial payments in December 2014, January 2015 and February 2015, and that consequently applicant received partial payments in those months. More importantly, is the allegation that EC Mining gave a glimmer of hope that everything will be fine and that the arrear payment will be worked in the payments of the following eight months. Applicant's response thereto is simply that it never agreed that payment to it would be delayed if EC Mining did not pay. This is against the background that Caveoplant was a broker, with a six month turn-around payment to applicant from date of service. The Applicant confirms its knowledge that between March 2015 and May 2015, respondents took legal action against EC Mining, which initially denied indebtedness and was later liquidated.

[46] Against this background, I am unable to find that the respondents contravened section 76 (3) of the Companies Act.

[47] In my view, to succeed on the basis of section 218(2), it must not only be shown that a person contravened any provisions of the Act, and that another person suffered damage. It must also be shown that such damage suffered was as a result of that contravention. In other words, there must be proof of a causal link or connection

between the contravention of the Companies Act, and the debts or liabilities for which the person may be held liable.

[48] The section, in my view is not some backdoor for businessmen and women, through which to seek to use as an escape route and derive an unfair advantage of getting others to personally carry the cost of their business risk, which risk they must naturally and ordinarily carry under the circumstances caused by the loss of money or some interest as a result of external business pressures. In my view, what is envisaged in the section, is any contravention, whether it amounts to an offence or not, which has an adverse effect on the creditors' claims.

[49] From the facts as set out in the papers before me, in my view, the real and proximate cause of the inability of Caveoplant to pay its creditors which include the applicant, is the financial difficulties experienced by EC Mining. In my view, the failure of Caveoplant was as a result of external forces, and not internal forces and more specifically it was not as a result of the conduct of the respondents. There is nothing to indicate that the respondents were not attentive to the affairs of Caveoplant.

For these reasons I make the following order:

The application is dismissed with costs.

DM THULARE
ACTING JUDGE OF THE HIGH COURT