IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO,: 34198/2013
DATE:10/6/2016

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED

10/6/2016 ……

In the matter between:

MOTOR INDUSTRY BARGAINING COUNCIL Plaintiff

and

R F BOTHA First defendant
(ID:4…)

R F BOTHA Second defendant
(ID: 7…)

JUDGMENT

VAN DER WESTHUIZEN, A J

1. The plaintiff is the MOTOR INDUSTRY BARGAINING COUNCIL, duly registered in the office of the Registrar of Labour Relations in terms of section 29(15)(a) of the Labour Relations Act, No. 66 of 1995, as amended, (the Act).

2. The first defendant is Roelof Frederik Botha, a qualified chartered accountant and former director of Wildcat Performance Exhausts (Pty) Ltd, registration number 2000/000492/07 (the Company).

3. The second defendant is Roelof Federik Botha, the son of the first defendant and former director of the Company.

4. The plaintiff instituted action proceedings against the defendants in their capacities as erstwhile directors of the Company in respect of unpaid statutory obligatory deductions as prescribed in the Collective Agreement referred to below.

5. It is common cause that:

(a) The first and second defendants were the active directors of the Company since 2000, the date of registration of the Company, until 16 October 2012;
(b) In terms of section 32 of the Act, collective agreements were concluded and were declared to be binding upon all employers and employees in the motor industry;
(c) The Company was registered with the plaintiff in terms of the appropriate Collective Agreement, as it was obliged to do.
(d) The Company was voluntary liquidated by special resolution on 16 October 2012;

6. The aforesaid collective agreements included:

(a) A Main Collective Agreement;
(b) An Administrative Collective Agreement;
(c) An Autoworkers Provident Fund Collective Agreement; and
(d) A Mibco Auto Workers Provident Fund Collective Agreement.

7. The Company was further obliged in terms of the Collective Agreements, unless specifically exempted by the plaintiff, to make certain contributions and to deduct from the employees' salaries, certain amounts of money towards the employees provident funds. The Company was not exempted. The Company was to pay the amounts over to the plaintiff, as well as the plaintiff’s levies, on a monthly basis on/or before a certain date.

8. It is further common cause that the Company failed to make the required payments to the plaintiff as an when it was obliged to do so. Consequently, arbitration awards were made against the Company in that regard. In total seven arbitration awards were made against the Company over the period 2009 to 2012. None of the awards were opposed by the Company and the Company consented to an award made on 10 October 2010.

9. It is also common cause that the Company never complied with the aforesaid awards and made no payments in respect thereof.

10. The defendants do not dispute that in terms of the aforementioned awards, the Company, as at 16 October 2012, was indebted to the plaintiff in an amount of R1 512 336.60.

11. The proceedings instituted against the defendants for payment of the aforesaid amounts are in terms of the provisions of section 424 of the Companies Act, No. 61 of 1973 (the repealed Act), alternatively in terms of section 218(2) read with section 22(1) of the Companies Act, no. 71 of 2008 (the Act) and further in the alternative in terms of section 20(9) of the Act.

12. In their defence against the plaintiff's claims, the defendants raised a special plea of prescription in respect of some of the awards. Its defence on the merits related mainly to a denial that the defendants had recklessly or fraudulently carried on the business of the Company. The defendants alleged that the Company was unable to sustain itself in a financially viable manner due to trading losses it suffered. The defendants further averred that due to the adverse financial position of the Company, it was unable to pay its debts and thus it was voluntarily liquidated on 16 October 2012.

13. Before dealing with the question of whether the plaintiffs claim as pleaded falls to be decided under the provisions of section 424 of the

repealed Act or under section 218 read with section 22 of the Act, it is necessary to set out the relevant facts.

14. The crux of the matter relates to the Company's failure to pay over the statutory obliged deductions and the alleged reasons for not complying with its obligations in that regard.

15. The reasons advanced by the defendants in their evidence in respect of the failure to pay over the obligatory deductions, are varied and contradictory.

16. Initially, the first defendant stated that the reason for not paying over the obligatory deductions to the plaintiff was that the Company had experienced cash flow problems.

17. The company, so testified the first defendant, had chosen to pay the more pressing creditors to enable it to keep its doors open and in an attempt to trade out of its poor financial position.

18. The first defendant further testified that, although the obligatory deductions were shown in the Company's books, it was in actual fact not deducted, as there were insufficient funds available. The employees were merely paid their nett salary. In other words, there were no deducted monies to be paid over.

19. Mr. Botha senior, the first defendant, further stated in his explanation that the monies meant to be paid over to the plaintiff, i.e. the deductions, were "loaned" from the plaintiff to expand the business of the Company. This evidence implies that there were in fact sufficient funds to pay over, but that the plaintiff unknowingly assisted the Company to expand its business. He conceded that the plaintiff was oblivious of such "loans". This evidence is contradictory to his earlier evidence that there were merely "insufficient" funds. The first

defendant's explanation that it was necessary to expand the business of the Company did not explain how that would assist the Company.

20. The first defendant testified that the intention was at all times to pay the unpaid creditors, however only once the Company was financially able to do so. In this regard, Mr. Botha senior conceded that the Company at first never paid its dues in respect of SARS and the UIF, until it was caught out. Only then did the Company pay those due or the agreed amounts. That approach is difficult to reconcile with an intention to pay, once the Company was in a financial position to pay unpaid creditors. The Company simply had no intention to pay the unpaid creditors, until steps were taken to enforce their rights in that respect.

21. Mr. Botha senior further testified that whenever the plaintiff sought to enforce payment of the monies due to it, the Company would seek leniency in that regard by pacifying the plaintiff in alleging that the Company would soon make payment. In this regard, counsel for the defendants submitted that such approach was acceptable business practice and evidence of an intention to pay the plaintiff.

22. However, the numerous arbitration awards granted against the Company that remained unpaid since 2009, gainsays such an intention. There was a deliberate intention not to pay the plaintiff. This is evident from what follows.

23. The Company never responded to any of the notices of arbitration proceedings (bar the proceedings of 10 October 2012) nor to any of the awards. Counsel for the defendants submitted that such conduct indicated that the Company acknowledged that it was obliged to pay the dues. There is no merit in that submission. That submission by counsel is no support of a view that the Company at all times intended to pay its creditors.

24. On behalf of the Company, the second defendant attended the arbitration proceedings on 10 October 2012. Mr. Botha junior consented to the award that was made on that day. This consent was made with full knowledge that the Company had ceased to trade, at the latest on 30 September 2012, and that a decision had been taken to voluntary liquidate the Company. The voluntary liquidation occurred on 16 October 2012, a mere six days after the consent to the arbitration award on 10 October 2012. It was clear that the Company had no intention to pay the plaintiff.

25. Mr. Botha junior faintly testified that he had advised the plaintiff and the arbitrator on 10 October 2012 of the fact that the Company had ceased to trade by 30 September 2012. It is glaring that that evidence was not put to the plaintiff's witness who testified that he was present at the arbitration proceedings on 10 October 2012. The veracity of Mr. Botha's evidence in that regard could not be tested and is rejected.

26. The second defendant further testified that no decision was ever taken to not pay a creditor. He testified that the decision was taken in respect of which creditor should be paid. This implies that a decision was taken not to pay other creditors despite their entitlement to payment.

27. In this regard, it is telling that the landlord was not paid which inevitably resulted in the "lock-out" of the Company from the premises. One would have thought that a landlord would be a "pressing" creditor, for without premises, the Company would not be able to trade. The non-payment in respect of the landlord is indicative of a decision not to pay.

28. The defendants were hard pressed to explain why, when financial assistance was obtained from the Frik Botha Familie Trust, the creditors were not paid when the indebtedness to them fell due. The

explanation that it was important to expand the business of the Company is more a ruse than an indication of an intention to "eventually" pay the creditors. It is clear the Company was unable to pay its debts as and when such fell due. Regardless of the Company's inability to pay its debts, the business of the Company was being extended. According to the evidence of Mr. Botha, the expanding of the Company's business extended since its inception.

29. From the first defendant's evidence, it is clear that since its inception the Company was unable to pay its debts as and when such fell due. The submission by counsel for the defendants that what in fact occurred was preference of a creditor over another, is without merit. There were deliberate decisions and an intention not to pay all the Company's creditors.

30. The concession that the company had "loaned" the obligatory deductions from the plaintiff to expand the business of the Company clearly indicates that there was no intention to pay the plaintiff its dues.

31. Further in this regard, it is telling that when there was unhappiness on the part of the employees in respect of the non-payment to the plaintiff of the deductions made, they were pacified by being directly paid by the Company. The explanation that, had those monies been paid over to the plaintiff, it would "go into the pool" and the employee would not receive it when claimed, is a further indication that there never was any intention to pay the monies over to the plaintiff. The Company would merely pay those amounts when claimed by the employees.

32. The defendants admit that, in the books of the Company, the impression is created that the obligatory deductions were in fact made. This impression is further supported when regard is had to the salary payslips of the employees. Mr. Zwane, an employee of the

Company, testified in respect of the payslips. He testified that it was indicated on the payslips that there had been a deduction of the Autoworkers provident fund. It could be gleaned therefrom, in particular with reference to the deductions relating to the provident fund, that the deductions were in fact made.

33. Mr. Zwane further testified that on enquiry at the plaintiff, the plaintiff apparently had not received such deductions. Mr. Zwane testified that at no stage were the employees advised that the deductions in respect of the provident funds were not being paid over to the plaintiff and for what reason it was not so paid over. Mr. Zwane was adamant that no explanation was forthcoming.

34. Only when the second defendant was confronted by the employees in that regard, was it admitted that the provident deductions were not paid to the plaintiff. The second defendant confirmed that when being confronted by the employees about the non-payment to the plaintiff, he merely admitted that fact and did not explain to them the effect thereof on the employees and their rights in that regard.

35. The defendants did not deny that when the plaintiffs officials visited the Company in order to reconcile the deductions made in respect of the salaries of the Company's employees and the monies paid over to the plaintiff, those officials were *inter alia* privy to the payslips of the Company's employees. I have already dealt with what those payslips reflect.

36. Not only were the Company's employees induced to accept that the monies were in fact deducted, but also the said officials of the plaintiff.

37. Mr. Botha senior was at a loss explain why the monies advanced by the Trust could not be utilised to pay the Company's debt toward the plaintiff.

38. The first defendant attempted to rely on preliminary discussions entered into with the Midas Group during the middle of 2012. Those discussions were with a view of supplying the Company's products to the Midas Group outlets. According to Mr. Botha senior those discussions were undertaken to enable the Company to trade out of its hopeless financial position.

39. However, it is clear from Mr. Botha's evidence that those discussions were in its infancy and much had to happen before serious negotiations would ensue. The first hurdle that the Company had to overcome was its incapability of achieving the demand set by the Midas Group in respect the required volume of products. The target was way beyond what the Company could handle. Mr. Botha senior conceded that the Company was obliged to undergo a financial restructuring before it could address the demand set. Only once that could be achieved, would serious negotiations ensue. It was no quick fix.

40. The conduct of the landlord referred to above that led to the closure of the Company's business and the subsequent voluntary liquidation, put paid to that dream.

41. On the evidence of Mr. Botha junior, it is clear that the Company's employees were dismissed a week before 30 September 2012, the date set by the landlord for the Company to evacuate the premises. The defendants were acutely aware that the company would not trade after 30 September 2012.

42. The defendants' assertion that the value of the Company's assets were sufficient to cover the Company's debt owed to the plaintiff should the plaintiff have enforced its rights at any time, is of no consequence as the defendants were astute to point out that should any creditor of the Company attach the Company's assets and sell it in execution to satisfy the Company's indebtedness to that creditor,

the Company would not be able to trade further. The second defendant testified that, had the plaintiff attached the Company's assets and sold them in execution, the inevitable result would have arisen that arose due to the landlord's actions.

43. The reasons offered by the defendants for the voluntary liquidation of the Company, namely that it was purely due to the poor financial position of the Company, is only a half-truth. It is not reconcilable with the objective facts dealt with above. If the Company had at all times the intention to pay its creditors, and in particular the plaintiff as suggested by the defendants, it does not follow why:

(a) the plaintiff is not told on 10 October 2016 that the Company had been locked out of its trading premises;
(b) that its work force had been dismissed;
(c) that the Company would not trade after 30 September 2012; and
(d) that the Company would enter into voluntary liquidation.

Yet the Company consents to an arbitration award it has no intention to pay.

44. Subsequent to the voluntary liquidation of the Company in October 2012, a liquidator was appointed in February 2013.

45. However, the landlord of the premises upon which the Company conducted its business had arranged a sale in execution of the Company assets that was held during January 2013. The first defendant testified that the landlord had sold the Company's assets as scrap metal. Those assets mainly consisted of the manufacturing equipment used in the conduct of the Company's business. In this regard, the defendant's evidence that the value of the Company

assets were sufficient to defray the Company's indebtedness to the plaintiff is in stark contrast with the assets being sold as scrap metal.

46. Despite indicating to the plaintiff that no financial documents relating to the Company were available as these were held at the trading premises of the Company and were lost and/or destroyed as a result of the lock-out by the landlord, some financial documents miraculously appeared and were made available to the plaintiff, eight days prior to the commencement of this trial.

47. The defendants sought to rely upon those document to show that the Company was in fact growing as the "sales were up" every year. That alleged "growth" did not reflect well on the Company's debt profile. The value of the assets of the Company reflected in those financial documents mirrored the indebtedness of the Company to the Trust.

48. In view of all of the foregoing, the defendants' evidence as to the manner in which they as directors had conducted the business of the Company barely bears scrutiny. The impression is created that the evidence was carefully presented to avoid a finding of recklessness or gross negligence or an inference of fraudulent conduct to be drawn therefrom.

49. The objective facts clearly override any purported subjective view of what was happening in the company. Subjectively, the directors could not truly have believed that the Company would trade out of its financial mess in the manner in which the financial aspects were being handled. The reasonable person or business, in the position as director of the Company, would in the particular circumstances, not have held that view. Their[1] evidence does not support such finding and is contrary thereto. The defendants were acutely aware of what the true position was. Their evidence in that regard is rejected.

[1] *Fourie v Newton* [2011] 2 All SA 265 (SCA) [28]

50. The enquiry in respect of the premise of the plaintiff's claim, involves a consideration of the provisions of section 424 of the repealed Act, section 218(2), read with section 22(1) of the Act and section 20(9) of the Act.

51. The plaintiff's reliance upon section 20(9) of the Act can be summarily dealt with. That section finds application where on application by any person or in any proceedings in which a company is involved, the court finds that the incorporation of the company or any act on behalf of the company constitutes an unconscionable abuse of the juristic personality of the company as a separate entity, a court may *inter alia* declare that the company is to be deemed not to be a juristic person.

52. *In casu,* there is no application nor is the Company involved in any proceedings. Furthermore, on the evidence presented, no finding as contemplated in section 20(9) of the Act can be made. Section 20(9) of the Act simply finds no application.

53. Mr. Mushet, counsel for the defendants, submitted that section 424 of the repealed Act finds no application in the present matter as that section had been repealed on 1 May 2011 being the effective date of the commencement of the current Act. Counsel for the defendants further submitted that the action was instituted post the date of repeal. Plaintiff instituted these proceedings on 3 June 2013. Thus, counsel for the defendant submitted, section 424 of the repealed Act does not apply. In this regard, Mr. Mushet relied on the judgment in *Graney Property Limited et al v Gihwala et al* (1961/10: 12193/11) [2014] ZAWCHC 97 (26 June 2014). That judgment finds no application in this matter for what follows.

54. In terms of the Transitional Arrangements contained in Schedule 5 of the Act, item 2 thereof provides that pre-existing companies

incorporated under the repealed Act continue to exist under the Act as if it had been incorporated under the Act.

55. Item 9 of Schedule 5 of the Act provides that despite the repeal of the previous Companies Act, Chapter 14 of the repealed Act continues to apply in respect of pre-existing companies, but only with reference to the winding-up and liquidation of companies under the current Companies Act.

56. It is common cause that the Company was voluntary liquidated on 16 October 2012 and that a liquidator was appointed during February 2013. It follows that the Company was being wound-up when the present proceedings were instituted.

57. The *Graney-matter* dealt with the provisions of Items 10(1) and 13(1)(c) of schedule 5 of the Act, the Transitional Provisions.

58. It follows that section 424 of the repealed Act applies *in casu.*

59. The plaintiff relies in the alternative on the provisions of section 218(2) of the Act when read with section 22(1). Section 22(1) provides as follows:

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

Section 218(2) of the Act provides as follows:

> *"(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."*

60. Section 218(2) of the Act provides a general remedy to any person, including a creditor to sue any person who contravenes any provision of the Act for any loss or damage suffered as a result of the contravention.[2]

61. The provisions of the aforementioned sections of the Act are similar to the provisions of section 424 of the repealed Act and only differ where section 218(2) requires the element of causation.[3]

62. The Learned authors of *Henochsberg on the Companies Act, 71 of 2008* in their commentary under section 22(1) state that the law relating to section 424 of the repealed Act applies when interpreting section 22 of the Act.[4]

63. The aforesaid authors deal with the concepts of recklessness, gross negligence and intent to defraud when dealing with the provisions of section 424 of the repealed Act in the context of decided cases on the said concepts.[5]

64. The non-payment of the obligatory deductions to the plaintiff, and the apparent use thereof to expand the business of the Company, clearly constitutes gross negligence on the part of the defendants as directors of the Company. It was clearly done with disregard to the rights of the plaintiff and of the rights of the Company's employees. It follows that the Company itself was prejudiced thereby.

65. The representation on the payslips of the Company's employees that the statutory obligatory deductions were in fact made was intentionally made to defraud, not only the employees, but also the plaintiff.

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2 *Sanlam Capital Markets (Pty) Ltd v Mettle Manco (Pty) Ltd et al* [2014] 3 All SA 454 (GJ) par [40] - [43]; *Rabinowitz v van Graan* 2013 (3) SA 315 (GSJ) par [22]

3 *Rabinowitz v van Graan* 2013 (3) SA 315 (GSJ) par [9] - [10]

4 *op cit,* at pp 104 - 105

5 *op cit,* at pp APPI -296 - APPI - 300

66. The directors of the Company, the first and second defendants, intentionally did not pay creditors as and when the creditors' entitlement to payment fell due. In not paying over to the plaintiff the statutory obligatory deductions, *inter alia* those relating to the Companies' employees provident fund, the defendants acted in a reckless manner.[6]

67. It is further clear from the evidence that the conduct of the first and second defendants resulted in the plaintiff suffering the loss or damage complained of.

68. Accordingly, the provisions of section 218(2), read with section 22(1) of the Act apply.

69. It follows that the defendants had acted recklessly, with an intention to defraud, not only the plaintiff, but also the Company's employees and had acted in a gross negligent manner.

I grant the following order:

1. It is declared that the first and second defendants, the erstwhile directors of Wildcat Performance Exhausts (Pty) Ltd, registration number 2000/000492/07 (the Company) are personally responsible for the Companies indebtedness to the plaintiff in the amount of R1 512 336.60 (One million five hundred and twelve thousand three hundred and thirty six rand and sixty cents) plus interest thereon at the applicable rate from 16 October 2010 to date of payment;

2. The first and second defendants are to pay to the plaintiff the amount of R1 512 336.60 (One million five hundred and twelve thousand three hundred and thirty six rand and sixty cents), plus interest thereon at the applicable rate from 16 October 2010 to date

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[6] *Ebrahim* et *al v Airport Cold* Storage *(Ply) Ltd* 2008(6) SA 585 (SCA) at [15]; See also the authorities dealt with in *Henochsberg,* referred to in footnote 4 *supra*

of payment, jointly and severably, the one paying the other to be absolved;

3. Costs of suit on the scale as between attorney and own client scale.

CJ VAN DER WESTHUIZEN
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION

On behalf of Plaintiff:	A Greyling
Instructed by:	Lingenfelder Baloyi Attorneys
On behalf of Defendant:	S J Mushet
Instructed by:	Klapper Jonker Inc.