IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

Case Number: **7895/2000**

In the matter between:

HELGARD MULLER MEIRING TERBLANCHE	**First Applicant**
MULLER TERBLANCHE TRUSTEES (PTY) LTD	**Second Applicant**
ABSA BANK (PTY)	**Third Applicant**

v

FARAH DAMJI	**First Respondent**
EILEEN MARGARET FEY N.O.	**Second Respondent**
(In her capacity as liquidator of	
OFFSHORE DESIGN COMPANY (PTY) LTD)	

JUDGMENT DELIVERED ON 11 SEPTEMBER 2001

Knoll J:

This is an opposed application brought in terms of the provisions of section 424 of the Companies

Act No 61 of 1973 (hereinafter referred to as "the Act").

The relevant portions of section 424 (1) and (2) (a) of the Act read as follows:-

> "*When it appears, whether it be in a winding-up, judicial management or otherwise, that any business of the company was or is being carried on recklessly or with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the Court may, on the application of the Master, the liquidator, the judicial manager, any creditor or member or contributory of the company, declare that any person who was knowingly a party to the carrying on of the business in the manner aforesaid, shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court may direct.*

2a) Where the court makes any such declaration, it may give such further directions as it thinks proper for the purpose of giving effect to the declaration, and in particular may make provision for making the liability of any such person under the declaration a charge on any debt or obligation due from the company to him..."

The applicants seek the following orders:-

a) That the first respondent be declared to be personally responsible for all the liabilities of Offshore Design Company (Pty) Ltd (in liquidation), (hereinafter referred to as "the company"), alternatively, for those liabilities of the company to first, second and third applicants.

b) In terms of section 424 (2) (a), that it be directed that such personal liability be a charge on any debt or obligation due from the company to the first respondent.

c) That the costs of this application be costs in the liquidation of the company, alternatively

that the first respondent pay them on an attorney/client scale.

d) Further and/or alternative relief.

In the founding affidavit, deposed to by first applicant, he describes himself as a business man and liquidator. He is the managing director and sole shareholder of second applicant. He alleges that he is authorised, on behalf of second applicant, to launch this application. First applicant alleges that he receives any appointments as a liquidator of companies in his personal capacity. Any duties which he carries out in that capacity are as a liquidator *nomine officio*. Second applicant does not receive such appointments but is the administrative vehicle through which first applicant receives such appointments, with the approval and knowledge of the Master. It is alleged that this is the practice followed by most liquidators. Third applicant is a bank and there is an affidavit confirming first applicant's affidavit, insofar as it is applicable to third applicant.

The first respondent is sued because she was the sole shareholder and director of the company at all material times.

The second respondent is cited in her capacity as liquidator of the company and no relief is sought against her. Second respondent has not opposed the application.

The background to the matter is essentially common cause. On the 2nd of March 1999 the company was duly registered as "*Rowmoor Investments No 182 (Pty) Ltd*". Its name was changed on the 3rd of December 1999 to Offshore Design Company (Pty) Ltd. First respondent was the sole director of the company from the 14th of June 1999.

On the 10th of December 1999 a provisional liquidation order was sought and granted in the former name of the company. (Hereinafter referred to as “the first liquidation”). The first liquidation was at the instance of first respondent, brought by way of a special resolution of the company signed by her as sole member. On the 14th of December 1999 the first applicant was appointed as the provisional liquidator in the first liquidation. He decided to continue running the business of the company and certain transactions were concluded during the period of its provisional liquidation. On the 16th of March 2000 the provisional liquidation order was discharged.

On the 17th of August 2000 the three applicants in this application sought the winding up of the company. The application was opposed by the first respondent. On the 5th of September 2000 the company was provisionally wound up by Van Reenen J. This provisional order was made final on the 11th of October 2000. (Hereinafter referred to as “the second liquidation”). The second respondent was appointed as the liquidator in the second liquidation.

The applicants allege that the amount of R 34 402.00 is due and owing to first applicant and/or second applicant and the amount of R 213 400.00 to the third applicant and/or the first applicant by the company.

The applicants allege that the first respondent knowingly carried on the business of the company recklessly and/or with the intention to defraud its creditors and/or creditors of applicants and/or with a fraudulent purpose.

They base their allegations on a number of alleged acts of, and transactions concluded by, first respondent related to the business of the company. These acts and transactions may conveniently be compartmentalised as follows:-

e) During November 1999, the fraudulent alteration of the amount payable on a cheque made out to the company;

f) The application by the first respondent for the first provisional liquidation of the company;

g) During March 2000 the unauthorised, allegedly fraudulent, payment to Robfar Trust of three cheques made out by first applicant to creditors of the company while the company was under the first provisional liquidation.

h) From ± January to April 2000 a series of fraudulent credit card transactions on credit card facilities granted by third applicant.

i) Certain transactions concluded from January to March 2000 i.e. the sale of the first respondent's shareholding in the company in liquidation, the sale of the business of the company and the sale of certain assets, ostensibly belonging to first respondent, in her personal capacity.

j) The first respondent's opposition to the second liquidation application.

First respondent disputes the allegations of the applicants that she so carried on business and raises a number of disputes relevant to each of the aforesaid transactions. First respondent has also raised points *in limine, inter alia*, denying this court's jurisdiction to hear the matter; disputing the applicants' *locus standi* and submitting that certain parts of the applicant's founding affidavit be struck out.

Mr Mouton, who acted on behalf of the applicants, made application at the outset of the hearing for a separation of the issues in terms of Rule 33 (4) of the Uniform Rules of Court. He requested that this court order that the issues be separated as follows:-

k) That all issues relevant to the alleged fraudulent credit card transactions be stayed; and

b) That this court decide whether the applicants are entitled to the relief claimed only on the basis of all the aforesaid acts or transactions, excluding the credit card transactions.

l) That, should this court conclude that disputes of fact in the affidavits with regard to all or any of the transactions, excluding the credit card transactions, do not allow of final relief on the papers, that the whole case should be sent to oral evidence.

m) That, should this court find that the applicants are not entitled to any relief on the basis of all or any of the alleged transactions, excluding the credit card transactions, then the issue relating only to the credit card transactions should be referred to oral evidence.

Mr Hitchcock, who acted on behalf of first respondent left the decision in this regard in the hands of the court.

The application for separation of the issues as set out above was granted and the issues duly separated. I indicated that reasons would follow. I now briefly give reasons for this decision.

Rule 33 (4) provides that on the application of any party in any pending action, a court shall make an order that a question of law or fact may be decided separately from any other question and may order that all further proceedings be stayed until such question has been disposed of unless it appears that such question cannot conveniently be decided separately.

Mr Mouton submitted that it would be convenient to remove the credit card transaction allegations from the issues and decide the matter on the remaining transactions. He submitted that the applicants were entitled to the relief claimed on the basis of the remaining transactions. Furthermore, he submitted that the matters raised *in limine* relevant to the whole matter, or only the remaining transactions, could conveniently be disposed of at this stage of the proceedings.

The allegations of fraud with regard to the credit card transactions are in dispute. The disputes are factual and, in my *prima facie* view, would have required referral to oral evidence. Oral evidence would involve considerable costs and inconvenience to the parties, particularly since the first respondent no longer resides in South Africa.

A number of the points raised *in limine* relate to problems and/or *lacunae* in the applicants' founding papers, which the applicants attempted to resolve in reply, as also by way of an application to supplement their papers. Some of these points were relevant only to the allegation by the applicants that first respondent had been the author of a number of fraudulent credit card transactions. In addition, the application to supplement applicants' papers might well have necessitated a postponement of the matter. The supplementation was relevant only to the factual issues with regard to the allegations of credit card transaction fraud by first respondent.

I was of the view that, if Mr Mouton were correct in his contention that the applicants were entitled to the relief claimed on the remaining transactions, considerable extra costs and inconvenience would be avoided. The matter might also be disposed of by the points raised in limine. It was my view that it would be convenient both to the court and the parties should the application be granted.

The applicants' locus standi is placed in issue on the papers. It was also alleged on the papers that certain matters should be struck out of the founding affidavit. These points were not pursued by Mr Hitchcock in argument. He conceded there was no foundation for the allegations that certain matters should be struck out.

Even though Mr Hitchcock did not pursue the disputed *locus standi* in argument, I have, in any event, considered the applicants' *locus standi.*

First applicant makes the allegation that the company is indebted to him and/or the second applicant in the amount of R34 402,00 and to himself and/or the third applicant in the amount of R213 400,00. The applicants refer, in substantiation of this allegation, to the judgment of Van Reenen J annexed to the papers in the second liquidation application. Van Reenen J refers to written undertakings to pay the third applicant the amount of R213 400,00 and the first and/or second applicant the amount of R26 402,00. It was found by Van Reenen J that the respondent's instructions to her attorneys to address these written undertakings to the applicants constitute clear acknowledgements of the company's indebtedness to the applicants and accordingly their *locus standi* to have brought the liquidation application. In reply to these allegations the respondent denies the indebtedness by the company to the applicants and their *locus standi*. Applicants have, in reply, filed an affidavit from Adv. Mihalik, who appeared for the first respondent in the second liquidation application. To this affidavit are annexed certain papers which were handed up during the hearing of the second liquidation application. Amongst these papers are the copies of the written undertakings to pay the said amounts. I agree with Van Reenen J that these documents constitute clear acknowledgements of the company's indebtedness to first and/or second and third applicants. The respondent has not disputed the existence of these acknowledgements of debt or their correctness.

Other than a bare denial of indebtedness the first respondent fails to deal with the acknowledgements of debt at all. In my view, this denial is insufficient to raise a

real, genuine and *bona fide* dispute of fact. [Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T) at 1165].

I am satisfied on all the papers that the applicants are creditors of the company in liquidation, at least, in the amounts of R26 402,00 and R213 400,00 as indicated, and accordingly that they have the *locus standi* to bring this application.

The issues which this court is now required to decide are the following:-

1) *In limine* -

a) Whether this court has jurisdiction to hear the matter;

b) Whether with regard to the alleged transactions, excluding the credit card transactions, there are disputes of fact raised which disentitle the applicant to final relief on the papers and/or which require referral to oral evidence.

n) Merits -

The issue on the merits is whether the applicants are entitled to the relief sought on the basis of all or any of the allegations on the papers, excluding the credit card transactions.

Jurisdiction -

Section 19 (1) (a) of the Supreme Court Act No 59 of 1959 provides, *inter alia*, that

this court shall have jurisdiction over all persons residing in its area of jurisdiction. The time for determining the jurisdiction of the court to entertain an action, is the time of the commencement of the action. (Thermo Radiant Oven Sales (Pty) Ltd v Nelspruit Bakeries (Pty) Ltd 1969 (2) SA 295 (A) at 310 D to E). Both counsel were *ad idem* that the time when an application is regarded as having been instituted, for the purposes of jurisdiction, is when the application papers are served. I agree with them that this is the correct time to determine jurisdiction. (Mills v Starwell Finance (Pty) Ltd 1981 (3) SA 84 (N); Ex Parte Minister of Native Affairs 1941 AD 53 at 58-59; Mayne v Main 2001 (2) SA 1239 (SCA) at 1243 C). First respondent disputes that she was resident in the area of jurisdiction of this court at the time of the service of the application papers.

The onus of establishing jurisdiction based on the respondent's residence rests on the applicants. (Mayne v Main (*supra*) at 1242 H).

The application papers were served personally on the first respondent on the 30th of

October 2000 at no. 5 Mimosa Court, 279 Beach Road, Sea Point, Cape. Applicants allege in the founding papers that first respondent resided at that address.

It is common cause that first respondent was at all material times a British citizen. It is not disputed that on the 30th of October 2000, the first respondent was staying at the aforementioned address. She admits in her opposing papers that she was "*resident*" at the above address on the 24th October 2000, that is the date on which first applicant signed the founding affidavit. This admission is made "*subject to what is stated in sub-paragraph 20.2 below"*. One looks in vain for paragraph 20.2 below. Assumedly, the intention is to refer to 14.2. Paragraph 14.2 reads as follows:-

> "*On the aforesaid date I had already made all necessary arrangements to travel to my residence in the United Kingdom pursuant to the sentence of the Regional Court, Cape Town (annexure "MT18" to Terblanche's founding affidavit)".*

It is common cause that on the 8th of August 2000 the first respondent was charged with, and convicted of, nine counts of fraud in the Magistrates Court for the district of Cape Town. On each of the nine counts she was sentenced to a fine or six months imprisonment and, in addition, a further six months imprisonment was suspended for five years on certain conditions, *inter alia*, "*that accused leave South Africa on or before the 31st of October 2000 and does not return*."

The respondent makes the allegation that to the knowledge of the applicants she neither resided, nor was domiciled within the area of jurisdiction of this court on the date that the application was launched. She said she was on the verge of departing from South Africa in order to return to the United Kingdom pursuant to the said sentence. She had applied for, and received, an extension, until the end of November 2000, of the date set by the magistrate for her departure. She stated that in terms of the aforesaid sentence she was obliged to depart and was not permitted to return. She therefore did not have the intention, after her departure, of ever returning to South Africa. Mr Hitchcock submitted that because the first respondent was on the verge of departure from South Africa, she was no longer residing here for the purposes of jurisdiction. He argued that she was only temporarily present within the jurisdiction of the court. Mr Mouton contended that although she intended to depart from South Africa permanently, she had not yet done so and consequently she still resided here.

In the matter of Mayne v Main (*supra*) the Supreme Court of Appeal again approved the basic principles which govern a matter such as this one, as set out in Ex parte Minister of Native Affairs (*supra*). The principles are summarised as follows at page

1243 A to E:-

> "(1) In giving a court statutory jurisdiction over a person who resides in its area the Legislature has simply followed the common law rule actor sequitur forum rei*..;*
>
> o) The question is not one of *domicile but of residence. A defendant may have his* domicile *at one place and his residence for the time being at another..;*
>
> p) *A person can have more than one residence. Where that is the case he (or she) must be sued in the court having jurisdiction at the place where he is residing at the time when the summons is served..;*
>
> q) *A person can not be said to reside at a place where he is temporarily visiting. Nor does a person cease to reside at a place even though he may be temporarily absent on certain occasions and for short periods..;*
>
> r) Apart from the above, the Courts have studiously refrained from attempting 'the impossible task' *of giving a precise or exhaustive definition of the word* 'resides'. *Whether a person resides at a particular place at any given time depends upon all the circumstances of the case seen in the light of the applicable general principles.. ."*

In addition to these principles, the Supreme Court of Appeal held the following:-

s) That although a person may have more than one residence for the purposes of jurisdiction, a person can only be residing in one place at any given moment (p 1243 F).

t) That for the purposes of jurisdiction our courts do not recognise the concept of a *vagabundus*. A person must reside somewhere (page 1249 B).

u) A person's intention is not necessarily conclusive. The objective facts must be looked to

to decide the question of factual residence. (1248 I to J)

With regard to the question of the meaning of residence, the Supreme Court of Appeal (at 1243 F to I) approved of three definitions of residence as being amongst the more appropriate definitions thereof. They are the following:-

> a) "*It has never been layed down what degree of permanence is required in residence; but at all events it ought to be shown that the person sought to be brought within the jurisdiction had some interest in the place which he was served, in the sense that there was some good reason for regarding it as his place of ordinary habitation at the date of service*." (Hogsett v Buys 1913 CPD 2000 at page 205).

> v) "*(w)hen it is said of an individual that he resides at a place it is obviously meant that it is his home, his place of abode, the place where he generally sleeps after the work of the day is done*." (Beedle and Co. v Bowley (1895) 12 SC 401 at 403).

> w) Residence "*conveys...some sense of stability or something of a settled nature*." (Tick v Broude and Another 1973 (1) SA 462 (T) at 469 F to G).

Applying these principles to the facts of this case, it is my view, for the reasons set out hereunder, that at the time of the service of the application papers the first respondent was resident at 5 Mimosa Court, Beach Road, Sea Point as alleged by the applicants.

Although it is not apparent from the papers how long the respondent had been resident in Cape Town, it is apparent that she had been involved in the running of the company in South Africa from at least 1999. In June of 2000 the applicants brought a certain application against the first respondent in the Magistrate's Court. The papers in this application are annexed to the first respondent's papers. In that

application she deposed to an affidavit, dated the 3rd of July 2000, in which she admitted to being resident at Mimosa Court, Beach Road, Cape Town. In that affidavit she stated the following:-

> "*I have no intention of leaving the country, have family in the Republic of South Africa and are permanently employed by Chartrade 32 CC t/a Offshore Trading Company, 9-11 Regent Road, Sea Point."*

This statement was made in reply to an averment by the applicants that the first respondent might leave the country at any stage because she is a British citizen with a British passport.

It is clear that before she was convicted of fraud, the first respondent resided at Mimosa Court, Beach Road, Sea Point and had no intention of leaving South Africa. In addition, in her opposing affidavit in the current application she admitted that, as at the 24th of October 2000, after she was found guilty of fraud, and the relevant condition of suspension was imposed on her as part of her sentence, she was resident at Mimosa Court in Sea Point. She does not allege that as at the date of service of the papers she had moved from this address.

It is apparent that at the time of the service of this application, Mimosa Court in Sea Point was the place of the first respondent's "ordinary habitation". Although this situation was to be changed, at that stage no physical change had yet taken place, even if she had made arrangements to return to London and set up residence there. In my view, she had not yet established residence in London. Thus in this case, in my view, although her presence in Sea Point was not "*of a settled or permanent nature*", indeed her permanent departure was imminent, it was nevertheless her home at the time.

In my view, the following words of Milne JP in Klisser v McGovern 1963 (4) SA 483 (N) at 487 C to D are appropriate to this case. On the facts of that case it was held that the residence of the particular respondent in South Africa constituted him an *incola*. The learned judge took the following view:-

> "I take the view, further, that if his residence in this country had such a character of permanency in a sufficient degree to make him an *i*ncola*, he does not cease to be an incola, or a person who is resident in this country, merely because he declares his intention of terminating his residence at an early date.* Ex hypothesi *it has not been terminated, there has merely been a declaration of intention to terminate it."*

Mr Mouton referred me to the matter of Becker v Forster; Karsten v Forster 1913 CPD 962. The facts of that case showed that the defendants, who had resided at Brandfort and Bloemfontein respectively, had abandoned those residences and were on their way to settle on certain erven at Waterkloof in the district of Phillipolus. They intended to go and reside there. Before taking up residence there, however, they had stayed at a farm called, Dwarsbalk, in the district of Colesberg. Their time of residence at Dwarsbalk was a matter of six weeks. Despite the fact that the six week residence was intended to be only of a temporary nature, the fact that they had abandoned their earlier residences and had not yet taken up their new residence at Waterkloof, meant that they were actually and ostensibly residing within the Colesberg area at the time of the proceedings and that the local Magistrate had jurisdiction over them.

Mr Mouton drew an analogy with the facts here in the sense that although first respondent's residence in Sea Point was not of a permanent and settled nature and she had the intention to leave shortly after the application papers were served on her, that was the only residence which she had at the time of such service. She had not yet taken up her new residence in London. I agree with Mr Mouton that the facts are analogous. Our law does not recognise a *vagabundus*. The first

respondent must have been resident somewhere. The only place where she was actually and ostensibly residing at the time of the service of the application was Sea Point.

Accordingly it is my finding that this court has jurisdiction to entertain this application.

Factual disputes.

I now turn to the issue of whether there are factual disputes on the papers of a nature which precludes final relief and/or requires referral to oral evidence.

The principles to be applied in the determination of this issue are as set out in the *locus classicus* on this issue, Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634 E to 635 C.

> "*It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact (see in this regard Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T) at 1163-5; Da Mata v Otto NO 1972 (3) SA 858 (A) at 882D - H). If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross examination under rule 6 (5) (g) of the Uniform Rules of Court...and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks...Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers... ."* (At 634 H to C).

Mr Mouton submitted that the disputes of fact raised by the respondent on each of the transactions on which the applicants rely for relief are either not real, genuine or *bona fide* disputes of fact and that the applicant's statements are so inherently credible that they may be accepted, or that the allegations or denials of respondent in these regards are clearly untenable. Mr Hitchcock, on the other hand, submitted that this was not a case where the court could resolve the disputes of fact on the papers.

I shall deal with the disputes raised with regard to each transaction seriatim, as compartmentalised above.

x) The alleged fraudulent alteration of a cheque.

As indicated above, it is common cause that the first respondent was convicted of 9 counts of fraud. Copies of the charge sheet, first respondent's written statement in terms of section 112 (2) of Act 51 of 1977; her conviction and sentence are annexed to the applicant's papers.

The allegations in count 9 were that, during November 1999, the first respondent fraudulently altered the amount payable on a cheque drawn by one, Janet Salt, and payable to the company; the alteration was from R1 725 to R11 725; and this cheque was fraudulently presented to the ABSA Bank, Sea Point by first respondent.

The relevant sections of first respondent's plea statement with regard to this count read as follows:-

"*I wish to come clean and plead guilty to all the charges...*

Ad Charge 9

I admit that during November 1999 at Offshore Trading Sea Point I presented to ABSA Sea Point a cheque in the amount of R11 725.00, knowing that I was only entitled to an amount of R1 725.00. I put the one (1) in front of the 1 725.00 and as such committed fraud."

In her opposing affidavit in the instant case, the first respondent admits the charge, conviction and sentence as well as her plea and plea statement. However, she alleges the following:-

"*46.2 ..... it is necessary to place the aforesaid allegations in context as it cannot be viewed in a vacuum. By 8 August 2000 I had been embroiled in litigation and negotiation of more than one year with the Director for Public Prosecutions and the Department of Home Affairs. I had also been embroiled in constant conflict with Terblanche. I was involved in a host of civil actions and was involved in numerous disputes with Genesis Consulting. Furthermore I was embroiled in civil actions with an ex-boyfriend.*

46.3 At the time of drafting the plea I had already spent four nights incarcerated at Sea Point Police cells and would frankly have agreed to anything just to be able to go home. I had no idea as to the threat of liquidation or how a plea of guilty would actually affect me in any tangible way. My counsel asked me whether I would be prepared to plead guilty and if I wanted to stay in South Africa. At that point I had no wish to remain in the Republic of South Africa and could not see how it would affect me personally, or otherwise, in any way whatsoever to plead guilty to these charges. If the true position was explained to me, I would have been in a position to consider pleading not guilty and making application for bail."

I agree with Mr Mouton's submission that it is significant that nowhere in the first respondent's opposing affidavit does she state that she is, in fact, not guilty of count 9. Her reply to the applicant's allegations in this regard, in my view, does no more than suggest that, at the time of the plea of guilty, she did not fully appreciate the ramifications of a conviction following on such plea.

She then states that had she been aware of the ramifications, she would have considered pleading not guilty. Mr Hitchcock submitted that a denial of guilt is implicit in her statements. I do not agree with Mr Hitchcock. In my view, all that is implied by her statements is that she would not have pleaded guilty had she been aware of the consequences that have now occurred. In my view, her statements in this regard leave the impression of evasiveness.

> "Enough must be stated by respondent to enable the court ... to conduct a preliminary examination of the position and ascertain whether the denials are not fictitious, intended merely to delay the hearing. The respondent's affidavits must at least disclose that there are material issues in which there is a bona fide *dispute of fact capable of being decided only after* viva voce *evidence has been heard."* (Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd (*supra*) at 1165).

The respondent has admitted to pleading guilty in a court of law to fraudulently altering a cheque and presenting it for a greater amount than it was made out for. Vague suggestions of compulsion to plead guilty unaccompanied by an assertive statement denying actual guilt on count 9 are in my view insufficient to raise a real, genuine and *bona fide* dispute of fact. I find, accordingly, that the applicants' allegations in this regard may be accepted.

y) The first liquidation

The following allegations were not in dispute:-

z) That in her founding papers in the first liquidation, first respondent did not disclose:-

i) The company's name change; and

ii) The fact that the company owned an immovable property, erf 547 Bantry Bay in the Cape, the nett value of which persuaded first applicant to continue trading to bridge what he regarded as temporary cash flow problems.

iii) That the company's assets exceeded its liabilities;

aa) The first liquidation was launched to ward off a sale in execution of certain movable assets seized by the Sheriff in execution of a judgment against first respondent in her personal capacity.

In her affidavit founding the application for liquidation, first respondent alleged that the attached goods belonged to the company and that she had brought interpleader proceedings but, because of her absence at the hearing, despite the fact that she had informed the relevant parties in advance that she could not attend the hearing, it went ahead and the company's claim to the goods was dismissed. She stated that the creditors would be severely prejudiced as the goods attached were ordered by customers, and some paid for. New items would have to be manufactured for these clients at extra cost to the company. She stated that the company was not in a financial position to take further action, and that because of her foreign nationality she could not raise any loans. She proposed that a liquidator should be appointed as a matter of urgency to consider what steps to take to recover the company's goods.

In the instant application, first respondent gives the following explanation for her failure to disclose the company's name change and the immovable property in the first liquidation application. She states that she handed all the relevant documentation, including the change of name to her erstwhile attorney, de Rooy. She alleges that it was on his advice that she moved for the liquidation of the

company, which she was reluctant to do. Her counsel, according to her, advised against liquidation, but de Rooy insisted that it was the only solution to the company's problems. De Rooy suggested the first applicant as liquidator, and it is common cause that the first applicant met with the first respondent prior to the liquidation application.

First respondent alleges that she expected de Rooy to have disclosed the name change and furthermore that:-

> "At the very first meeting with Terblanche (first applicant) *I disclosed the company's assets, including the immovable property and I believed that counsel, who drafted the founding affidavit, would have disclosed this in the papers."*

The allegations that she disclosed the property to first applicant prior to liquidation are denied in reply. First applicant avers that he only became aware of it after the liquidation. De Rooy, in reply, is silent as to the property, but denies that he or counsel were informed of the name change prior to the application. Furthermore, he denies that he advised first respondent to proceed with the liquidation. He avers that his advice was to the contrary.

The disputes on this issue, in my view, are factual disputes which it is not possible to decide without oral evidence. I cannot agree with Mr Mouton that there is room for a finding on these disputes that they are not real and genuine or are completely untenable. In regard to this transaction therefore, I find only the facts which are admitted by, together with the facts alleged by, first respondent may be had regard to.

bb) The three cheques paid to Robfar Trust.

It is common cause that, on the 15th of March 2000, three cheques made out to three creditors, and drawn on the company in provisional liquidation's account were

handed to first respondent by first applicant.

It is, furthermore, common cause that the first respondent paid all three cheques into the account of Robfar Trust, of which Trust she is a trustee. Furthermore, it is not disputed that she endorsed one of the cheques.

The disputes as to these transactions are the following:-

cc) The first applicant averred that the three cheques were handed over to the first respondent with the express instruction to pay them to the three creditors concerned. The numbers in first respondent's affidavits which refer to paragraphs of applicants affidavits at this point do not follow consecutively. It is therefore not apparent whether this averment is denied or admitted. However, in my view, when first respondent's averments in regard to the cheques are had regard to, it is clear that there is no real and genuine dispute of fact about this allegation.

dd) First applicant avers that after the cheques had been handed to first respondent, each of the three creditors came to his offices asking for payment of the amounts owed them. First applicant informed them that first respondent had the cheques. The creditors requested payment from him because they did not want to travel to Sea Point. First applicant then telephoned first respondent and advised her of this development. First respondent undertook, at his request, to return the three cheques. He accordingly paid the creditors with other cheques. All these allegations are denied by first respondent.

ee) First respondent avers that she paid all three creditors with cheques from the Robfar Trust. This is denied by the first applicant in reply and three affidavits of persons representing the aforesaid creditors are annexed confirming first applicant's allegations in the founding papers with regard to payment by him to them with company cheques. All three affidavits state that the

creditors had not received payment by way of cheques from Robfar Trust. In reply, applicants annex a further affidavit from one, Dale Irvine, allegedly the first respondent's co-trustee in Robfar Trust. He states that he was unaware of any attempts by the first respondent to draw funds on the trust to pay the said creditors.

ff) First applicant avers that the payment into Robfar Trust by the first respondent was fraudulent. This is denied. First respondent gives the following explanation for the payment into the trust:-

> "*The reason I did so was simply that I preferred not to have cheques lying around the business, waiting to be collected by the payees."*

Mr Mouton submitted that all these denials and disputed counter-averments by first respondent were untenable. He pointed out that copies of the cheques paid to two of the creditors, which copies are annexed to the founding affidavit and to each of the relevant creditors' replying affidavit, shows that these creditors were indeed paid by first applicant, on behalf of the company, as alleged. I agree with Mr Mouton, that in the light of the objective evidence of the cheques, the genuiness of which is not disputed, that respondent's denials that the creditors were paid by first applicant on behalf of the company as he alleges are untenable and applicant's averments are hereby rendered inherently credible.

It is common cause that the three cheques were handed to the first respondent on the 15th of March 2000. Copies of the three cheques which were handed to the first respondent and paid into the Robfar Trust are annexed to the founding affidavit. It is not disputed that the respective date stamps on the cheques, indicating the date on which they were paid into Robfar Trust's account, are the 23rd of March 2000, the 25th of March 2000 and the 27th of March 2000. Mr Mouton submitted that these dates give the lie to the first respondent's explanation as to why she paid the cheques into Robfar Trust. I agree with Mr Mouton. The cheques were not all paid in on the same day. Furthermore the cheques "lay

around" for a minimum of eight days and, in the case of the last one, twelve days, after they had been handed to her. The first respondent gives no explanation as to why it is that it was necessary for the cheques to lie around at all and why she did not immediately dispatch the cheques to the creditors concerned. In my view, the first respondent's explanation is inherently lacking in credibility and untenable.

Furthermore, it is a significant feature, in my view, that first respondent annexes no documentation in the form of cheques or bank statements in proof of the payment she alleges she made from Robfar Trust to the creditors. She avers that she paid them by cheque drawn on the Robfar Trust. There is no explanation why she has not annexed such proof of payment.

Mr Hitchcock did not suggest that I could not have regard to the affidavits of the creditors and Mr Irvine in reply. He submitted that it is one party's word against the other whether or not payment was made by Robfar Trust. He submitted that in such circumstances a court cannot decide on papers.

In the instant case, there is objective evidence which is not disputed which, as indicated, contradicts the version of the first respondent with regard to the explanation for the payment into Robfar Trust. Furthermore, there is a significant lack of objective evidence from first respondent showing that she indeed did pay monies from Robfar Trust to these creditors. I am of the view that, in this instance, the first respondent's averments and denials are also untenable.

In summary, I am of the view that applicants' allegations that the first respondent took cheques well knowing that they were payable to creditors of the company and paid them into the Robfar Trust, an entity of which she was a trustee may be accepted. I am further of the view that the allegations may be accepted that monies were not paid from the Robfar Trust to these creditors, but that the company paid these creditors with different cheques. The first respondent's explanation for her conduct is untenable and is rejected on the papers.

gg) The transactions concluded between January and March 2000.

The following facts are common cause:-

hh) First respondent was a member of a close corporation known as Char-Trade 33 CC. Char-Trade was registered on the 25th of January 2000 and first respondent was a member as from the 24th of February 2000.

ii) On the 26th of March 2000 (10 days after the discharge of the provisional order of liquidation) first respondent sold the business of the company to Char-Trade for R100. The agreement is reduced to writing and forms part of the papers. First respondent signed as both buyer and seller.

jj) According to this agreement the subject matter sold was "*the carrying on of the business of interior designers and traders*". The purchase price was calculated as follows:-

> "*The purchase price of the subject matter of this sale shall be the sum of R100 (One Hundred Rand) derived as follows:*
>
> | | | | |
> |---|---|---|---|
> | *Assets* | | *Liabilities* | |
> | *Stock* | *96000* | *Creditors* | *230000* |
> | *Net Asset Value* | *(126000)* | | |
> | *Monthly Turnover* | *112500* | | |

to be paid by the Purchaser free of bank charges and commission at Cape Town on demand."

kk) On the 24th of February 2000 first respondent sold her shares in the company (at that time in provisional liquidation) to the Robfar Trust for R10.

ll) On the 25th of February 2000 first respondent sold certain "household contents", in her personal capacity to Robfar Trust for the amount of R618 500.

The only disputes of fact in regard to any of these transactions relates to the affidavit of Dale Irvine, in reply, who states that the amount of R618 500 was never paid by the trust to the first respondent. I do not propose to have regard thereto. This statement is not appropriately made in reply and Mr Mouton has not suggested that it is significant.

mm) The second liquidation.

Before dealing with the applicants' allegations with regard to the first respondent's opposition of the liquidation application, I shall deal with the facts related thereto which are common cause.

i) In terms of a written agreement, dated the 29th of August 2000, first respondent sold, on behalf of the company, the immovable property at Bantry Bay to her parents for the purchase price of R1. 500, 000. According to this agreement the purchase price was payable on transfer.

ii) A separate written addendum, also dated the 29th of August 2000, was entered into by the first respondent, on behalf of the company, and

her parents varying the terms of the said agreement of sale in order to provide that payment of the purchase price be made by way of R950 000 upon registration of transfer and the balance payable "*on 25 years written notice. The outstanding balance shall be interest free*."

iii) According to the judgment of van Reenen J, who heard argument in the matter on the 29th of August 2000, and granted the provisional liquidation order on the 5th of September 2000, the company's only asset, as disclosed to him, was the said immovable property. A first mortgage bond had been registered over this property in favour of Saambou Bank, in respect of which Saambou Bank had obtained summary judgment in the amount of R406 366.07. It is not disputed that this was the only asset of value which the company owned at the stage of the provisional liquidation thereof.

iv) The said agreement of sale formed part of the first respondent's opposing papers in the opposition of the second liquidation application.

v) The application for liquidation was opposed, *inter alia*, on the basis of the sale of the property for the purchase price of R1.500, 000.

The applicants aver that the first respondent failed to disclose to the court the existence of the addendum. It is this averment which is denied by first respondent, who makes the following statements in this regard:-

"*Both my attorney and counsel were fully aware of the terms of the addendum which was handed to counsel by my instructing attorney and I have little doubt that counsel would have done the ethical thing by handing it up to the judge seized with the matter....*"

"*I respectfully submit that, as already stated, counsel was handed the addendum prior to argument at the application and that he would not have willingly misled the above Honourable Court."*

Adv Mihalik, who acted on behalf of the first respondent at the liquidation hearing, has annexed a replying affidavit in which he denies having been handed the addendum by his instructing attorney, Mr George De Beer, or by first respondent. He denies also that it was ever handed to the court. Adv. Mihalik annexed a bundle of documents to his affidavit which he avers are the documents that were handed to the court. Attorney De Beer, in a replying affidavit, confirms Adv. Mihalik's statements. No addendum is referred to in any of the documents which were annexed to Adv. Mihalik's papers.

It is apparent from Adv. Mihalik's affidavit that the liquidation application was launched on the 17th of August 2000, that it was opposed and postponed by agreement until the 24th and again until the 29th of August when argument was heard.

Mr Mouton submitted that first respondent's averments with regard to the handing up of the addendum to the court, were not credible, based, not only on Adv. Mihalik and attorney De Beer's denial thereof, but also on the judgment of van Reenen J.

In his judgment van Reenen J refers to each of the documents which were handed up to him or to which he had reference. His references accord with the documents annexed to Adv. Mihalik's affidavit, which he avers he handed up. Each of the documents is referred to and dealt with in the judgment. The learned judge refers throughout to the deed of sale and the purchase price therein of R1.500, 000 and even makes the following remarks as to the transaction of sale:-

"*The fact that the property was sold to the parents of the respondent's*

sole shareholder or their nominee; that the price appears to be substantively in excess of its market value; and the absence of provisions normally found in armslength transactions, create some doubt in one's mind regarding the genuiness thereof."

I agree with Mr Mouton that it is quite apparent from this judgment that the addendum was not handed up or referred to in court. Mr Hitchcock conceded in argument that, had it been handed up or mentioned, it is inconceivable that it would not have been referred to in the judgment.

Certain documents are referred to in the judgment as having been handed up during the course of argument in order to "*bolster first respondent's* bona fide's". According to the judgment they are; a) a resolution passed by the company ratifying the sale of the property; b) a power of attorney irrevocably to pass transfer; c) a statement of intention to irrevocably pass transfer and; d) a statement of intention to irrevocably receive transfer from her parents. Copies of these documents are annexed to Adv Mihalik's affidavit in reply in the instant case and all of them are dated 29/8/2000, the day after the addendum was signed. It is interesting to note that the addendum is not referred to in any one of these documents neither is there reference to any deferred payment of the purchase price. Where the purchase price is referred to, it is referred to as the full R1.500, 000.

The opposing affidavit in the second liquidation application is signed by the first respondent. The only references throughout this affidavit to the sale of the immovable property to her parents refers to the purchase consideration of R1.500, 000. Nowhere in the entire document is there any reference to the terms of the addendum. First respondent gives no explanation as to why she signed an opposing affidavit which did not disclose the deferred payment of a portion of the purchase price.

In my view, no reliance can be placed on first respondent's statements in this regard. Her averment on the papers that the addendum was disclosed to the court hearing the liquidation application is

disingenuous. So too is her allegation that she gave the document to her attorney and counsel. In my view, her statements in this regard should be rejected as clearly untenable on the papers. Applicants' averments that first respondent failed to disclose the existence, or the terms, of the addendum to the court, may in my view, be accepted on the papers.

Conclusion.

As indicated, the correct approach in matters such as these is as referred to in Plascon-Evans Paints v Van Riebeeck Paints (*supra*) but it must also be borne in mind that "*if, notwithstanding that there are facts in dispute on the papers before it, the court is satisfied on the facts stated by the respondent, together with the admitted facts in the applicant's affidavit, the applicant is entitled to relief (whether in respect of all his claims or one or more of them) it will make an order giving effect to such finding, with an appropriate order as to costs...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*." (Tamarillo (Pty) Ltd v BN Aitken (Pty) Ltd 1982 (1) SA 398 (A) at 430H to 431A; Howard v Herrigel and Another NNO 1991 (2) SA 660 (A) at 664H to 665G)

In the instant case, in addition to the admitted or undisputed facts those allegations and denials which I have found to be untenable or not raising real, genuine or *bona fide* disputes of fact, must be considered.

I proceed to examine the facts of this case on that basis.

Before doing so however, it is necessary to refer to the principles of law to which the facts must be

applied. These are the following:-

The law relating to section 424 of the Act.

The onus lies on the applicant to establish the necessary facts on a balance of probabilities. (Philotex (Pty) Ltd and Others v Snyman and Others; Braitex (Pty) Ltd and Others v Snyman and Others 1998 (2) SA 138 (SCA) at 142 I to J).

In order for this court to exercise its discretion whether or not to visit the respondent with personal liability for the company's debts the relevant portions of section 424 (1) require the applicants to establish that;

nn) Any business of the company, which may refer to any one transaction, was carried on; (Gordon N.O. and Rennie N.O. v Standard Merchant Bank Ltd and Others 1984 (2) SA 519 (C) at 528 H to I);

oo) i) Recklessly; or

ii) With intent to defraud creditors

aa) of the company; or

bb) of any other person; or

iii) With any fraudulent purpose; and

pp) By any person who was knowingly a party to the carrying on of business in the manner aforesaid.

"*Knowingly*" has been held to mean, in this context that:-

> "...*the person sought to be held liable had knowledge of the facts from which the conclusion is properly to be drawn that the business of the company was being carried on"* in one or all of the sanctioned manners. It would not be necessary to go further and prove that the person had actual knowledge of the legal consequences of those facts. (Howard v Herrigel and Another (*supra*) at 673 I to 674 A; Philotex (Pty) Ltd and Others v Snyman (*supra*) at 143 A to B).

Being "a party" in the aforesaid context means to participate in, take part in or concur in the sanctioned transaction. (Howard v Herrigel (*supra*) at 674 B to D). If the person concerned is a director of the company, however, he or she has a duty to observe the utmost good faith towards the company and, in so doing to exercise reasonable skill and diligence. Accordingly, a director "*has an affirmative duty to safeguard and protect the affairs of the company"* and may be "*a party"* in the aforesaid context "*even in the absence of some positive steps by him in the carrying on of the company's business"*. (Howard v Herrigel (*supra*) at 674 B to H).

The remedy created by section 424 is a punitive one and a director can attract liability for the debts of the company without proof of any causal connection between his sanctioned conduct and those debts. (Howard v Herrigel (*supra*) at 672 E; Philotex v Snyman (*supra*) at 142 I).

The word "recklessly" as used in section 424 has been defined as requiring at the very least gross negligence. (Philotex v Snyman (*supra*) 144 A).

> "The test for recklessness is objective insofar as the defendant's actions are measured against the standard of conduct of a notional reasonable person and it is subjective insofar as one has to postulate that notional being as belonging to the same group or class as the defendant, moving in the same spheres and having the same knowledge or means to knowledge." (Philotex v Snyman (*supra*) at 143 G to H).

The subjective consciousness of risk taking is not relevant, however, "*its existence is no impediment to the application of the objective test*." (Philotex v Snyman (supra) 143 C to H).

The issue of whether business was carried on with an "intent to defraud" creditors or for a fraudulent purpose, on the other hand, involves a subjective enquiry as to the respondent's intention in carrying on business in the manner alleged. (Ex parte Lebowa Development Corporation Ltd 1989 (3) SA 71 (T) at 103 G to I).

> "*Fraud is the unlawful and intentional making of a misrepresentation which causes actual prejudice or which is potentially prejudicial to another*". (CR Snyman; Criminal Law Third Edition at page 487.)

The necessary element of intention may, in the context of this section take the form of *dolus directus*, or dolus eventualis. (Ex parte Lebowa (*supra*) at 101 D to 104 F).

The law applied to the facts.

qq) The cheque-fraud transaction.

In my view, applicants have proved on a balance of probabilities that the first respondent committed fraud in November 1999 by altering the amount payable on a cheque made out to the company. She was the perpetrator of the transaction. All the elements of fraud are present. In so doing, she dishonestly inflated the assets of the company. The most probable inference to be drawn is that in so acting she was carrying out the business of the company. Such business was carried out with a fraudulent purpose.

rr) The first liquidation.

The second transaction relied on occurred during the first liquidation proceedings. The undisputed facts show that the change of the company's name and its ownership of immovable property were not disclosed to the court. It is, in my view, however not possible, given the disputes of fact in this regard, to find that the non-disclosure was deliberate, or that it was a misrepresentation made with fraudulent intent.

The question does arise, as to whether, on the undisputed and admitted facts, the signing of an affidavit which did not disclose the name change and the ownership of the immovable property was reckless. The first respondent was aware of the name change and the existence of the immovable property, yet she signed an affidavit, under oath, founding an application for liquidation of the company which did not disclose these two facts. She fails to explain how this came about. As a director of the company she has a fiduciary duty towards the company and its creditors. Her conduct in signing the affidavit which did not disclose these facts was, in my view, negligent. However, on the limited undisputed facts on the papers, I am not persuaded that her conduct can be held to have been reckless.

It is common cause that the first liquidation was brought, *inter alia*, in order to avoid the sale and execution of certain movable assets, allegedly belonging to the company. Clearly the liquidation of the company would not have had the effect of staying any sale in execution of assets belonging to the respondent personally. The allegation was made by the respondent in the liquidation papers that the company was unable to fund further litigation to recover these assets. The purpose was to have a liquidator appointed who might be able to do so to the benefit of creditors. The papers do not reveal the outcome of the liquidation application on the sale in execution. The purpose of the liquidation has not, in my view, been shown to have been fraudulent; nor have her actions in bringing the first liquidation application been shown to be reckless.

ss) The three cheques paid to Robfar-Trust.

It has, in my view, been shown on the probabilities that between the 23rd and the 27th of March 2000 the first respondent misappropriated company funds in the amount of R10 500. She paid monies, which she well knew were intended for creditors, into a trust account in which she had an interest. She did not pay the creditors the amounts owed. The most probable inference from these facts is that the first respondent stole the money from the company. This is so, even if she intended repaying it at a later date. (Cf. S v de Jager and Another 1965 (3) SA 616 (A) at 624 C to 626 A). Clearly such action would be detrimental to the company and potentially so to its creditors. Objectively, such conduct is, in my view, reckless. It shows a deliberate disregard for the consequences of her conduct insofar as it may affect the interests of the company or its creditors. First respondent's actions in misappropriating these funds, fall far short of the standard required of a reasonable director of a company conducting the business of the company in similar circumstances. (Cf. T.J. Jonck BK h/a Bothaville Vleismark v du Plessis N.O. en 'n Ander 1998 (1) SA 971 (O) at 985 C to E; Anderson and Others v Dickson and Another N.N.O. [Intermenua (Pty) Ltd (Intervening)] 1985 (1) SA 93 (N) at 110 G; Ex-parte Lebowa (*supra*) at 111; Ozinsky v Lloyd 1992 (3) SA 396 (C) at 413 D to E).

Insofar as first respondent's endorsement of the cheque is a misrepresentation to the bank that she was entitled to pay the cheques to an entity other than the payee, the most probable inference to be drawn from her conduct, given the prejudice to the company and her subsequent conduct in this regard, was that she made such representation with fraudulent intent.

tt) The transactions concluded from January to March 2000.

First respondent's actions in selling the business of the company for a nominal sum to an entity in which she had an interest, yet again, in my view, evinces a reckless disregard for the prosperity of the company and the interests of its creditors.

uu) The second liquidation.

The non-disclosure of the true amount that the sale of the company's only asset would bring to the company is a misrepresentation which could potentially have prejudiced creditors had the first respondent succeeded in thereby avoiding the liquidation of the company. In my view, the most probable inference from the facts is that the first respondent misrepresented the true position unlawfully and intentionally. Her opposition to the liquidation was undertaken in the name of the company and on its behalf. She was carrying on the business of the company with the intent to defraud creditors.

It is common cause that the bond holder had a preferent claim in the amount of between R420 000.00 and R450 000.00. The concurrent creditors' claims amounted to R1 067 574,99, of which R574 000.00 to R631 000.00 represent first respondent's loan account. The sale of the company's sole asset to members of first respondent's family with a clause that deferred payment of R550 000.00 of the purchase price for 25 years, is, in my view, more evidence of the first respondent's tendency to regard the company as her *alter ego* and to act in her own interests to the detriment of the company's prosperity and the interests of its creditors.

Conclusion.

Although, it may be correct, as submitted by Mr Mouton, that any one of these transactions on its own would allow this court to exercise its discretion and visit personal liability on the first

respondent, I express no view in this regard, as I am of the view that when the first respondent's conduct of the company's business, as from November 1999 through to the second liquidation, as evidenced by the transactions referred to above, is viewed cumulatively it was either fraudulent and/or reckless and the applicants are entitled to a declaration removing the first respondent's immunity from personal liability.

Although the transactions of the appropriation of monies to Robfar-Trust fall within the provisions of section 423 of the Act, I am satisfied that they also fall within the provisions of section 424. In Meskin: Henochsberg on the Companies Act, Volume I p.913, the learned author submits that although conduct which may justify the making of a declaration under section 424 (1), may also constitute conduct of a kind envisaged by section 423 (1), this would not prevent the court's entertaining an application against the person concerned under section 424 (1). While I agree with the learned author that the two sections are not mutually exclusive, it may be that in a given circumstance, it would be more appropriate to utilise section 423, as opposed to section 424. However, I express no view on this subject as I have concluded that the transactions referred to as a whole, bring the first respondent squarely within the provisions of section 424.

The extent of liability.

Section 424 (1) vests this court with a discretion to declare the first respondent liable for all the debts of the company or only for specific debts of the company. The applicants seek either that the declaration relate to all debts incurred by the company after November 1999, or only to the debts owed to each of them.

It has been held that the court making the declaration is not obliged to declare the delinquent director liable for a specific amount or specify the debts or liabilities by

naming the creditor or the amounts owed, but may make a general declaration that the liability will be for all the unpaid debts and liabilities of the company incurred from a certain date. (See Cronje N.O. v Stone en 'n Ander 1985 (3) SA 597 (T) at 601 I to 604 I and 615 G).

In supplementary heads of argument Mr Mouton submitted as follows:-

> "*Applicants would however prefer an order in the following terms:-*
>
> *9.1 First respondent is ordered to pay:*
>
> *9.1.1 First or second applicant an amount of R34 402,00;*
> *9.1.2 Third applicant an amount of R213 400,00.*
>
> *9.2 The aforesaid liability of first respondent to first, second and third applicants is a charge on any debt or obligation due from Offshore Design Company (Pty) Ltd. (in liquidation) to first respondent;*
>
> *9.3 First respondent must pay the costs of this application on the scale as between attorney and own client."*

In support of this preference, Mr Mouton has referred to the order granted in Philotex (Pty) Ltd v Snyman (*supra*) at 186 G to 187 H.

Such an order would clearly give an advantage to the applicants, enabling them to execute on it directly. However, I am of the view that such an order would be inappropriate in the circumstances of this case for the reasons set out hereunder.

This matter is distinguishable from the matter of Philotex (Pty) Ltd v Snyman (*supra*) in that there were at least seven creditors represented and the amounts constituting the debts concerned in that matter were agreed between the parties.

There was information available to the Supreme Court of Appeal regarding actions brought by other creditors and that the decision of liability on appeal would apply to their cases. (See page 186 I). The Supreme Court of Appeal was of the opinion, under these circumstances, that in the exercise of its discretion it should grant an order in specific amounts to be made payable to specific creditors. Its reasoning was that such an order made for greater certainty as regards the parties' respective rights and obligations flowing from the court's order. In the instant case, however, the amounts claimed by the three applicants are not admitted on the papers and this court was not asked to make findings as to this issue, other than as are necessary to establish the applicants' *locus standi* as creditors. No argument was addressed to me in this regard. The applicants have been found by me to have *locus standi* as creditors based on their allegations in the papers as to written acknowledgments of debt. In the case of first and/or second applicants, this is not the amount claimed by them.

The applicants did not seek relief in a specific amount in their notice of motion, it was raised for the first time in supplementary written heads submitted by agreement with Mr Hitchcock, after oral argument was heard. The notice of motion contains a general provision, in the alternative, that this court make an order that the first respondent be declared liable for the debts owed by the company to the three applicants. The second respondent did not oppose the relief sought in the notice of motion where no specific amounts are referred to, accordingly, second respondent was not represented at the hearing and has had no notice of the relief sought referring to specific amounts.

There has not been found to be any direct causal connection between first respondent's fraudulent and reckless conduct and any prejudice that these particular creditors in the form of the three applicants may have suffered. In the instant case the fraudulent/reckless conduct of the business of the company has not been shown to have prejudiced any particular creditors. Although there does not have to be any direct causal connection in order for this court to declare a delinquent director personally liable, in my view, however, in the assessment of the extent of the liability a court, to

properly exercise its discretion, should have regard to the actual prejudice suffered due to the delinquent conduct. In the instant case, for example, the first respondent's conduct in misappropriating company funds and selling the company business for a nominal amount, depleted the assets of the company to the detriment of all the creditors of the company. It would, in my view, be more just not to single out the applicants on the facts of the instant case, even though they assumed the risk of litigation.

The Supreme Court of Appeal in its judgment in the matter of Philotex (Pty) Ltd v Snyman (*supra*) did not deal with the question of whether or not, in a winding up situation, a court should order payment to be made to the liquidator for distribution among all the creditors. In Bowman N.O. v Sacks and Others 1986 (4) SA 459 (W) at 464 H to J, Flemming J remarked as follows:-

> "It is true that the wording of the section allows the Court, on the application of a creditor, properly to declare a director liable to the specific creditor, in a determined amount, with a resultant right for the creditor to exact payment from that director... Sometimes it will be more appropriate even then, mero motu *or at the request of the liquidator, to exercise the court's powers to the advantage of all creditors and not only the applying creditor. ...The object of section 424 is not to alter priorities amongst creditors as a matter of allowing favoured treatment... except perhaps where called for by special equitable considerations."*

In Joubert- The Law of South Africa the first re-issue, Volume 4 Part II p 309 - 310 paragraph 170 nl 4 & 5, on Company, Professor Blackman submits that it is the better view that the court should exercise its powers to the advantage of all creditors where the company is being wound up because of the problems of unfair treatment of creditors in the winding up of the company. (Cf. In re Gerald Cooper Chemicals Ltd [1978] 2 All ER 49 [Ch] and the judgment of Lord Russel in re Cyona Distributors Ltd. [1967] 1 All ER 281 [Ch]).

I respectfully agree with the views expressed by Flemming J and Professor Blackman. In a winding up it is important to consider the interests of the general body of creditors.

Little argument was directed to me as to whether it was the more appropriate order to benefit only the applicants in the instant case.

In the ordinary course no director is liable for the debts of the company, other than in certain circumstances. Section 424 (1) makes provision for a declaratory order that establishes such obligation in regard to such debts or liabilities of the company as are regarded by the court, in the exercise of its discretion, to be appropriate. The persons who are enumerated as possible applicants in section 424, are all people who have a direct and substantial interest in the subject matter of the declarator. The declarator relates to the obligations of the delinquent director and not to the rights of any party.

Other than the fact that the applicants took the risk of litigation in this matter, no reasons were given why they should be favoured with an order in a specific amount relevant only to the debts owed to them.

Furthermore, although, the first respondent's reckless/fraudulent conduct of the company business has been shown to have commenced, at least by November 1999, she became the sole director of the company in June of 1999. There is nothing in this matter to indicate that only creditors, whose debts were incurred from November 1999, were prejudiced by her conduct. Therefore, in my view, in the circumstances of the instant case, the order should not be applicable only to debts incurred from November 1999. Debts incurred before November 1999 may remain unpaid and still be legally enforceable.

Section 424 (2) deals with the steps which a court may take after the declaration is made to give effect thereto. A court is given wide powers to "*give such further direction as it thinks proper for the purpose of giving effect to the declaration*." Certain directions are then particularised. The applicants have not sought any directions other than an order that the first respondent's personal liability be a charge on any debt or obligation due from the company to the first respondent. The

allegation is that she has a substantial loan account which she should forfeit. It is my view that it is appropriate to grant this relief in the instant case, particularly as first respondent is currently a *peregrinus*. I have no information as to her personal assets, if any, in this country, however, recovering the relevant debts from her, personally, might prove costly and difficult. The purpose of section 424 is both compensatory and punitive. In my view, in the instant case, the first respondent's conduct has been such that the punitive element comes to the fore, and a directive that first respondent should forfeit her loan account or any other debt or obligation due from the company to her is appropriate.

Such an order should, in my view, in the circumstances of this case, have the effect of benefiting all the company's creditors. No further directions or orders have been sought and I do not propose to make any, as the second respondent and other creditors in liquidation have not been able to respond thereto.

For the above reasons, in conclusion, I am of the view, that the first respondent's liability should be for all the unpaid debts and liabilities incurred by the company between 14th of June 1999 and the second liquidation, and that any debt or obligation due by the company to her should be forfeit.

Costs.

The question of costs remains. Mr Mouton submitted that I should order the costs of this application to be costs in the liquidation should I order first respondent liable to all the creditors. He founded this submission on the argument that they have all benefited by this action. The second respondent has also not opposed the matter. Accordingly, he submitted there is no objection to such order before me. Mr Hitchcock, as was to be expected, raised no objection to the order which would be to the first respondent's benefit.

It is precisely this latter consideration that makes me loath to order the costs to be costs in the liquidation. In addition, such order will reduce the amounts available for distribution to concurrent creditors. Furthermore, I have no information as to which creditors, if any, have proved claims in the liquidation. The fact that the second respondent does not oppose such an order, does not indicate that creditors, who are not parties to this application would not object thereto. Although I am mindful of the fact that the applicants have borne the risk and incurred costs in this application which will benefit all the relevant creditors, it would seem to me that the only proper order to be made in the instant case is that the respondent pay the costs of the application.

The respondent's denials and allegations, as indicated above, have been rejected on the papers. Her conduct of the company, and her conduct in opposing this application, in my view, call for a punitive costs order against her. It is my view thus that she should be ordered to pay costs on an attorney/client scale.

Accordingly the following orders are made:-

vv) In terms of section 424 (1) of the Companies Act No. 61 of 1973, the first respondent is declared to be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of Offshore Design Company (Pty) Ltd (in liquidation) incurred as from the 14th of June 1999 to date of liquidation;

ww) In terms of section 424 (2) (a) of the Companies Act No. 61 of 1973, it is directed that the aforesaid personal liability of the first respondent be a charge on any debt or obligation due from Offshore Design Company (Pty) Ltd (in liquidation) to the first respondent;

xx) The first respondent is ordered to pay the costs of this application on an attorney/client scale.

JV KNOLL