

AMES ENGINEERING (PVT) LTD

Versus

MEKIAS MUNYARADZI

And

GODFEREY KARASE CHAKANYUKA

And

MIKE BOND

And

ADRIAN HAMILTON-MANNS

And

KARASE MATIPEDZA

And

NU AERO (PVT) LTD T/A FLY AFRICA

And

CASSINDY MUGWAGWA

IN THE HIGH COURT OF ZIMBABWE

DUBE-BANDA J

BULAWAYO 16 NOVEMBER 2021 & 6 JANUARY 2022

Opposed court application

J. Tshuma for the applicant

P. Madzivire for the respondent

DUBE-BANDA J: This is a court application filed in term of section 318 of the Companies Act [Chapter 24:03] for an order declaring 1st and 7th respondents to be personally liable for the judgment debt in *Ames Engineering (Pvt) Ltd (applicant) v Nu Aero (Pvt) Ltd t/a Fly Africa* HC 2915/18. The basis of this application is that the directors of the 6th respondent (company) conducted its business in a manner that is fraudulent, alternatively reckless or grossly negligent.

Cassindy Mugwagwa was joined as 7th respondent in terms of an order obtained in HC 775/19. On the 3rd April 2019, applicant filed a notice of withdrawal in respect of 2nd, 3rd, 4th and 5th respondents, leaving 1st, 7th respondents and the company. The company and 7th respondent did not oppose this application, it is only opposed by the 1st respondent. The applicant seeks relief couched in the following terms:

1. It is declared that the 1st, 6th and 7th respondents be and hereby declared personally responsible, without limitation, for the debt owed to the applicant by the 6th respondent in terms of section 318 of the Companies Act.
2. The 1st, 6th and 7th respondents be and is hereby joined as joint and several judgment debtors to the judgment debt owed to the applicant in terms of the court order handed down by the Honourable Mr. Justice Mabhikwa J on the 29th November 2018 in case No. HC 2915/18.
3. The 1st, 6th and 7th respondents be and hereby ordered to pay costs of suit on an attorney-client scale, jointly and severally, the one paying the others to be absolved.

Background facts

This application will be better understood against the background that follows. In HC 1105/18 applicant sued out a summons against the company, which filed a notice to defend and a plea. In the summons it is pleaded that the parties entered into a verbal agreement in terms of which the defendant agreed to receive certain amounts of money from the plaintiff and make payments to the plaintiff's suppliers within fourteen days of receipt. Defendant failed to make payment to plaintiff's suppliers as agreed or at all. Plaintiff prayed for an order cancelling the verbal agreement and defendant to be ordered to repay the sum of USD220 336.42.

In its plea the company admitted that it entered into a verbal agreement with the applicant. It however pleaded that the contract was null and void as it contravened section 11 (1) (b) of the Exchange Control Regulations SI 109/1996, in that defendant undertook to incur an obligation to make payment outside Zimbabwe. This court was urged to decline to determine the matter in favor of applicant on the basis of the *pari delicto* principle.

On the 1st November 2021, applicant filed an application for summary judgment in HC 2915/18. In the summary judgment application it was contended that the company has filed a

notice to defend for the purpose of delay. It had neither a *bona fide* nor *prima facie* defence to the claim. On the 29 November 2021, this court granted a summary judgment order couched in the following terms:

Judgment be and is hereby entered for the applicant against the respondent as follows:

1. Judgment may be summarily entered for the plaintiff in case number HC 1105/18.
2. Defendant shall pay to the plaintiff the sum of USD220 336.42.
3. Defendant shall pay interest on the prescribed sum at the rate of 5% per annum from the 19th February 2018, to date of payment in full.
4. Costs of suit on the attorney-client scale.

On the 12 December 2021 applicant caused to be issued out a writ of execution against the property of the company. The Sheriff rendered a *nulla bona* return of service, indicating that there was insufficient property belonging to the judgment debtor to satisfy the amount in the writ.

Applicant turned to the directors of the company and sued out this court application against 1st, 2nd, 3rd, 4th, 5th respondents and the company, alleging that the directors conducted the business of the company in a fraudulent manner, alternatively in a reckless or grossly negligent manner. It is against this background that applicant has launched this application seeking the relief mentioned above.

Applicant's case

Applicant avers that in November 2017, it was approached by one Mike Favour Sayi, who advised that he could facilitate a commercial transaction between applicant and the company. In terms of which applicant would pay certain monies into the company's bank account in Zimbabwe and it would then pay applicant's suppliers in South Africa. Applicant says on the 16 November 2017, 7th respondent and one Mr Clyde Chimedza confirmed that the Reserve Bank of Zimbabwe had approved such transactions. The deponent to the applicant's founding affidavit says it was shown references of payments made on behalf of other companies who had utilized the same facility which convinced him of its authenticity.

It is contended that applicant and the company then entered into a verbal agreement, the material terms being that the company would receive certain monies from the applicant in Zimbabwe and in turn make payments to applicant's nominated suppliers in South Africa. From the 21st November 2017 to the 30th November 2017 applicant paid the sum of USD220 336.42 to the company. Applicant supplied the company with the details of its suppliers in South Africa to whom payments were to be made as agreed. It is contended that in material breach of the agreement, and despite repeated demands, the company failed, refused or neglected to make the said payments to the applicant's suppliers in South Africa.

Applicant contends that the business of the company was carried out in a fraudulent manner in that the company through its agents made fraudulent representations to the applicant that if applicant paid money to it in Zimbabwe, it would pay the applicant's suppliers in South Africa; that it had the Reserve Bank authority and approval to use its foreign currency in South Africa to pay applicant's suppliers; and that it had the capacity to pay applicant's suppliers in South Africa.

It is alleged that applicant relied upon such representations in entering into the agreement with the company and paying it the sum of USD220 336.42. It is averred that such representations were false in that the company failed to make the payment to the suppliers in South Africa. It is contended that the company compounded its fraudulent activities by refusing to return the sum of USD220 336.42 to the applicant. It is averred that in HC 1105/18 the company raised a defense that it did not have Reserve Bank authority or approval to use its foreign currency in South Africa to pay applicant's suppliers.

It is contended that further and / or in the alternative the company carried out its business recklessly or with gross negligence in that it willfully failed to perform its obligations under the contract but rather misappropriated applicant's funds for its own use, was neither able to repay the funds nor did it have attachable assets in execution.

In its answering affidavit applicant avers that in terms of the current Particulars of Register of Directors and Shareholders (C.R. 14 for the company) 1st respondent is listed as a director. It is contended that 1st respondent is not absolved of liability by either his purported

resignation from the directorship of the company or the indemnity given to him by the company.

1st respondent's case

1st respondent avers that he was a director of the company and initially served on the Board with 2nd and 5th respondents. When the company changed shareholding he served on the Board with Cassidy Mugwagwa. His tenure in the Boards was predicated on the need to have an aviation expert, as a pilot he was appointed for the purposes of complying with regulatory requirements.

This respondent avers that he was in essence a non-executive director and he had no knowledge or access to company's day to day financial dealings as this was not part of his duties. He neither carried out any financial tasks nor was he a signatory to the company's bank accounts. His duties were to interface with the regulator and to ensure that the company was complying with aviation requirements.

It is contended that he resigned as director of the company on the 24 January 2017. His resignation was caused by the fact that he was at that stage working for another airline. He requested the company to provide him with an indemnity, and such an indemnity was duly provided. He had hoped that the new Board will lodge a new CR14 to reflect his resignation.

Further 1st respondent avers that he is not privy and has no knowledge of the facts or allegations that led to this application. He is not privy and has no knowledge of the circumstances that led to the payment of USD 220 336.42 to the company, and he believes that Cassidy Mugwagwa is better placed to address the issues raised by the applicant. He contends that he was not a director of the company when the cause of action arose and did not knowingly participate in the carrying on of the business of the company.

Applicant's answering affidavit

Mr *Madzivire* counsel for the 1st respondent urged this court to expunge the C.R.14 attached as an annexure to applicant's answering affidavit. It is contended that a matter stands or falls on its founding affidavit and applicant should not be permitted to adduce new evidence

of the C.R.14 by the medium of an answering affidavit. It is argued that 1st respondent has no means at this stage to oppose or deal with this C.R. 14 issue.

Per contra Mr Tshuma contends that it is indeed correct that an applicant must make its case in the founding affidavit. It is argued that in this application a case has been made in the founding affidavit that 1st respondent is a director of the company and hence liable in terms of section 318 of the Companies Act. It is submitted that such an averment is contained in the founding affidavit, wherein it is alleged that 1st respondent is a director of the company. It is argued that in the opposing affidavit 1st respondent agrees that indeed he was a director. It is contended that the placing of the C.R.14 *via* the answering affidavit must be seen in this context.

It is an established principle of our law that an applicant's cause stands or falls on his founding affidavit and not in an answering affidavit. See: *Chiangwa & Others v Apostolic Faith Mission in Zimbabwe & Others SC 67/21*. A litigant cannot found a case in the answering affidavit.

In *casu* applicant is not making a new case in the answering affidavit. The case is made in the founding affidavit that 1st respondent is a director of the company, and the answering affidavit and the C.R. 14 are meant to rebut 1st respondent's contention that he resigned as director on the 24th January 2017. This is exactly what an answering affidavit is designed to achieve, i.e. to rebut. This position was stated in the case of *Loveness Sengeredo v Eric Cable N.O.* HH 32/08 where Makarau JP, as she then was at p 2 stated that-

In my view, the purpose of an answering affidavit is akin to that of a replication in an action. It is filed not merely for the form but to specifically meet and traverse all the averments made in the opposing affidavit that have the effect of defeating the applicant's claim. Like in any pleading filed with the Court, all issues that are not specifically denied and traversed in the answering affidavit are to be taken as if they have been admitted... It is my further view that answering affidavits, like all other affidavits, must be drafted with precision and must meet the sting of the defence being raised in the opposing affidavit.

Therefore there is no basis to expunge the copy of the C.R.14 from the papers before court. It is not meant to make a new case that 1st respondent is a director, but to rebut his allegation that he resigned as director on the 24th January 2017. This is permissible.

The law and the facts

This is an application based on the provisions of section 318 (1) of the Companies Act [Chapter 24:03] which gives this court power declare that any of the past or present directors of the company or any other persons who were knowingly parties to the carrying on of the business in the manner or circumstances of recklessness; or with gross negligence; or with intent to defraud any person or for any fraudulent purpose shall be personally responsible, without limitation of liability, for all or any of the debts or other liabilities of the company as the court may direct.

In an action based on fraud there must be a false representation which has induced the contract and the false statement must have been made knowingly with the intention that it should be acted upon by the injured party to deceive it. In *Alcock v Mayhew* 1990(2) ZLR 346 (H) it was held that proof of fraud is an essential requirement and in order to establish this element it must be proved that respondent made a false representation with intent to deceive.

In *Ordeco (Pvt) Ltd v Govere & Anor* 2013 (1) ZLR 532 (H) the court held that the limited liability is afforded to persons who conduct business through the medium of a company. It is not there to protect them against conduct which is reckless or that takes place with fraudulent intent. Once a court has found the conduct of the director to be reckless or grossly negligent or to be motivated by fraudulent intent, then the principle of limited liability is set aside.

Applicant's factual averments are not contested or controverted. The evidence shows that it was a fraudulent representation that if applicant paid the company in Zimbabwe the company would in turn pay applicant's chosen suppliers in South Africa. It was a fraudulent representation that the company had obtained a Reserve Bank authority or approval to use its foreign currency in South Africa to pay applicant's suppliers. In fact in its plea in HC 1105/18 the company raised a defense that it did not have Reserve Bank authority or approval to use its foreign currency in South Africa to pay applicant's suppliers. It was a fraudulent representation that the company had the capacity to pay applicant's suppliers in South Africa. What is clear is that the company directors originated and perpetrated these fraudulent representation.

1st respondent's defence is that at all material times he was a non-executive director of the company and had no access to the company's day to day financial dealings. The jurisprudence is that for the purposes of liability in terms of section 318 (1) of the Companies Act it is inconsequential whether one is an executive or non-executive director. See: *Matemera v Karimazondo & Ors* HH 29/19 and *Al Shams Global BVI Limited v Sambadza* HH 373/16. In these two cases the case of *Howard v Herigel and another* 1991 (2) SA 662 @ 674 was cited as authority for this proposition, where the court said:

In my opinion it is unhelpful and even misleading to classify directors as 'executive or non- executive' for purposes of ascertaining their duties to the company or when any specific or affirmative action is required of them. No such distinction is to be found in any statute. As common law, once a person accepts an appointment as a Director he becomes a fiduciary in relation to the company and is obliged to display utmost good faith towards the company and in his dealings on its behalf.

Therefore, the fact that 1st respondent was not an executive director does not absolve him from personal responsibilities for the company's debts and liabilities under s 318 (1) of the Companies Act.

Mr *Madzivire* contends that it is a trite position of the law that directors of a company act on the basis of a board resolution. It is argued that applicant should have asked the company representatives to produce a board resolution authorizing them to negotiate and enter into such a contract. It is contended that there is no board resolution to show that the company had authorized the agreement with applicant. It is further argued that there is no board resolution to show that applicant had authorized the agreement with the company. It is submitted that the parties who negotiated the contract were on a frolic of their own, and their actions cannot be attributed to the parties who were not part to the transaction.

This defence regarding the alleged absence of board resolutions is not open to the 1st respondent at this stage. This is why. This application is not concerned with whether or not the company is indebted to the applicant. That enquiry was settled in HC 2915/18. The point is that this application is based on a judgment against the company in HC 2915/18. Whether the company representatives produced a board resolution authorizing them to enter into an agreement with applicant is not relevant in this application. The issues of board resolutions are

irrelevant at this point. Permitting a debate regarding board resolutions would be tantamount to opening cases HC 1105/18 and HC 2915/18 *via* the back door. Such would be impermissible.

Again 1st respondent cannot plead the absence of a resolution by the company as a basis to resist personal liability. The Turquand Rule does not permit such a defence. The rule has its foundation in the classical English case of *Royal British Bank v Turquand* (1856) 6 E&B 327, 119 ER 886. In terms of this rule an outsider contracting with a company in good faith is entitled to assume that the company internal requirements and procedures have been complied with. Applicant was entitled to assume that all internal procedures of the company were complied with when it entered into the agreement with it.

Again 1st respondent contends that he resigned on the 24th January 2017 from the directorship and further the company signed an indemnity agreement in his favour. It is submitted that at the time the transaction between applicant and the company was entered into, he was no longer a director and as such he is not liable personally for the company's judgment debt. It is argued that there is no evidence in the founding affidavit to show that 1st respondent was a director at the time applicant and the company entered into the agreement.

Applicant argues that 1st respondent is a director of the company, and his name remains registered in the company's C.R.14 filed with the Companies' Register. It is argued that in addition to disputing the authenticity of the purported resignation and the indemnity agreement, applicant submits that the returns filed in the companies' registry are *prima facie proof* of the correctness of the contents thereof. It contended that the C.R. 14 shows that the company's directors are 1st and 7th respondents.

I have already made a finding that the C.R 14 is properly before court and it shows that as at 23rd February 2019 1st respondent and 7th respondent were directors of the company. Therefore in November 2017 when the applicant and the company entered in the agreement 1st respondent was a director of the company. The presumption provided in section 12 of the Companies Act serves to operate against the company and its agents and representatives in favour of any third party doing business with such a company, in this case in favour of the applicant. There is a presumption that the contents of the form is a correct reflection of a company's directorship. 1st respondent by allowing his name to remain in the C.R.14 held

himself out as a director of the company. Consequently, third parties dealing with the company were entitled to rely on the C.R. 14 for the purposes of who the directors of the company were at the time. See: *Govere v Ordeco (Private) Limited & Another* SC 25/14.

On the available evidence 1st respondent had not resigned from the directorship of the company. In any event, even if it were to be accepted that the 1st respondent resigned as a director of the company, this would not relieve him of his duties as a director. This is so in terms of section 187(7) of the Companies Act, which provides thus:

(7) The resignation of a director or a secretary shall not relieve him of his duties as director or secretary, as the case may be, under this Act or under the articles of the company unless the director or secretary, having notified the Registrar and the company of his resignation, had reasonable ground to believe that the company would comply with subsection (4).

The *onus* was on the 1st respondent to ensure that the C.R.14 form was altered to reflect the position that he had resigned from the directorship of the company. There is no evidence that 1st respondent complied with the section 187 (7) of the Companies Act. In *Ordeco (Pvt) Ltd v Govere & Anor* 2013 (1) ZLR 532 (H) the court said:

The question that the arises is whether it is necessary, for the purposes of section 318 of the Companies Act, that 1st respondent be found to have been a director of Coldrac at all material times, including the time when the judgment debt was incurred. In my view, section 187(7) places an onus on a director of a company who has resigned to notify the company and the Registrar of the Companies of the fact of his resignation. The 1st respondent has not averred that he complied with this provision. The effect of failure to comply with section 187(7) is that the 1st respondent is still bound by the duties as a director of Coldrac, as if he has not resigned as he alleges. So the question whether he was a director at all material times is irrelevant. He was a director between 2003-2007 by his own admission. In the absence of proof that when he resigned he notified Coldrac and the Registrar of Companies, he is deemed to be a director of Coldrac to all intents and purposes, bound by the duties of a director.

1st respondent cannot rely on his purported resignation from the directorship of the company when there is no proof that he notified the Registrar of Companies of such resignation.

The company signed an indemnity in favour of 1st respondent. It indemnified him, his estate from and against all liabilities, costs, expenses, damages and losses - including but not limited to any derivative actions, third party actions, actions for fraud and / or reckless trading, etc. A provision in any contract between a director and a company in terms of which a director is indemnified against any liability for negligence, default, breach of duty or trust is void.¹ This indemnity cannot avail 1st respondent in this case as against the applicant, it merely amounts to an internal arrangement between the company and 1st respondent. It has no bearing on third parties and has no bearing on the applicant.

Conclusion

In *Orkin Bros Ltd v Bell* 1921 T.P.D. 92 where directors of a company which was in financial difficulties purchased large quantities of goods on credit without believing that they would be paid for and with reckless indifference as to whether they could be paid for or not, the court held that when ordering the goods they had been guilty of fraudulent representation (*viz.* that the company was in a position to pay) and were personally liable to pay the purchase price of the goods.²

The facts of this case show fraudulent representation on the part of the directors. As pointed out *supra*, the facts underpinning this application have not been disputed. 1st respondent does not dispute that the business of the company was carried out in a fraudulent manner, i.e. through its agents made representations that if applicant paid money to it in Zimbabwe, it would pay the applicant's suppliers in South Africa; that the company had the Reserve Bank authority and approval to use its foreign currency in South Africa to pay applicant's suppliers; and that it had the capacity to pay applicant's suppliers in South Africa. It is clear that these assertions were fraudulent representations calculated to mislead applicant into paying the company. The company did not have Reserve Bank authority and approval, and in fact in its plea in HC 1105/18 it raised the defense that it did not have such Reserve Bank authority or approval to

¹ Leveson G. *Company Directors Law and Practice* (Durban Butterworths 1970) 134.

² Leveson G. *Company Directors Law and Practice* (Durban Butterworths 1970) 138.

use its foreign currency in South Africa to pay applicant's suppliers. These fraudulent representations were originated and presented by the officials and directors of the company.

Because of its very nature an artificial entity, a company cannot perform acts on its own behalf and can only act through the agency of other persons. For purposes of attaining its objects and conducting its business the persons through whose agency it acts are its directors and its employees. It is the directors who direct and control the affairs of the company.

The purpose of s 318 (1) of the Companies Act is to discourage the abuse of corporate personality. It is framed to achieve that by providing a mechanism by which those responsible for the fraudulent, grossly negligent or dishonest use of corporate entities can be deprived of the benefit of immunity from personal liability that the legal fiction of juristic personality ordinarily confers on those who carry on business through a company. I take the view that the directors who were carrying on the business of NU Aero (Pvt) Limited t/a Fly Africa, directing and controlling the company be held personally responsible, without limitation of liability, for the discharge of the judgment debt in HC 2915/18. It is on this basis that this application must succeed as against the 1st respondent.

The 7th respondent did not oppose this application. I take the view that he took the position that he will abide by the order of this court, whatever it is. On the facts of this case, this respondent may not escape liability in terms of section 318(1) of the Companies Act.

This judgment is not concerned with whether or not the company is liable. That enquiry was settled by this court in HC 2915/18. I therefore see no reason why the company was joined in this application and no reason why another judgment should be granted against the company speaking to the same issues as in HC 2915/18.

The general rule is that the costs follow the result. There is no reason why this court should depart from such rule in this case. The 1st and 7th respondents are to pay the applicant's costs on the scale as between party and party.

Disposition

In the premises, I am thus satisfied that applicant has managed to prove the liability of the directors of NU Aero (Pvt) Limited t/a Fly Africa in terms of s 318 of the Companies Act. In the result I order as follows:

1. It is declared that Mekias Munyaradzi and Cassindy Mugwagwa (1st and 7th respondents) be and hereby declared personally responsible, without limitation, for the debt owed to the applicant by the NU Aero (Pvt) Limited t/a Fly Africa in terms of section 318 of the Companies Act.
2. The 1st and 7th respondents be and are hereby joined as judgment debtors to the judgment debt owed to the applicant in terms of the court order handed down by the Honourable Mr. Justice Mabhikwa J on the 29th November 2018 in case No. HC 2915/18.
3. The 1st and 7th respondents be and hereby ordered to pay costs of suit, jointly and severally, the one paying the others to be absolved.

*Webb, Low & Barry incorporating Ben Baron and Partners, applicant's legal practitioners
Joel Pincus, Konson & Wolhuter, 1st respondent's legal practitioners*