BARZEM ENTERPRISES (PRIVATE) LIMITED
versus
RELEASE POWER INVESTMENTS (PRIVATE) LIMITED
and
ONIAS ZIDANDA GUMBO
and
EVELYNE WINNITE GUMBO

HIGH COURT OF ZIMBABWE
CHAREWA J
HARARE, 4 & 17 October 2018

Opposed Application – Exception

Z Chidyausiku, for the plaintiff
A Masango, for the defendant

CHAREWA J: The plaintiff issued summons against the defendants, jointly and severally, the one paying the others to be absolved for payment of $207 344.16, being the purchase price of equipment purchased by the 1st defendant, represented by the 2nd defendant, which debt the 1st defendant acknowledged verbally and in writing. The claim against the 2nd and 3rd defendants in their personal capacities as directors of 1st defendant is predicated upon the provisions of s318 of the Companies Act [*Chapter 24:03*], in that, firstly, 2nd defendant personally undertook to liquidate the date from his personal resources. Secondly, 2nd and 3rd defendants acted with fraudulent intent or recklessly or with gross negligence when they authorised the purchase of equipment and made written undertakings for the payment of outstanding amounts when they well knew that 1st defendant would not be able to pay the agreed purchase price within the agreed time frames.

The 2nd and 3rd defendants excepted to the summons as disclosing no cause of action against them in that the claim being in contract, and 1st defendant having separate legal *persona*, there is no basis for lifting the corporate veil. In any case, their personal liability can only be assumed upon an order of court for leave to sue them in their personal capacities having been granted upon application in terms of s 318 of the Companies Act. Therefore, since no intention to defraud has been proven, the claim against them has no legal basis. In addition they aver that

they never gave any personal undertakings or guarantees to ground personal claims against them.

Is the claim against the 2nd and 3rd defendants contractual?

The relevant part of the plaintiff's summons reads, in paragraph (a) as follows

> "Payment in the sum of USD207 344.16 for equipment, being a Caterpillar Model 140K Motor Grade (*hereinafter referred to as "the Equipment*"), purchased by the First Defendant, represented by the Second Defendant from the Plaintiff. The Equipment was purchased in terms of a written Agreement, executed by the Parties in Harare, sometime in September 2012, in Harare (sic). The Defendant has acknowledged its indebtedness to the Plaintiff verbally, and in writing, the last such undertaking being addressed to the Plaintiff by the First Defendant on the 26th of February 2018;"

The relevant part of the declaration on its part, reads:

> "1.5 Second and Third Defendants are sued in their capacity as directors at all material times of the First Defendant, in terms of section 318 of the Companies Act [Chapter 24:03] ("*the Companies Act*") and as elaborated in greater detail in 2.6 – 2.8 below.
> 2.6 Second and Third Defendants are cited in their capacities as Directors at all times material of the First Defendant (sic). The Second Defendant has even made written undertakings to settle the debt due and payable to the Plaintiff, and renaged (sic) on that undertaking. **Annexure 3** provides examples of personal and corporate undertakings made by the Second Defendant, and the First Defendant.
> 2.7 Second and Third Defendants acted with a fraudulent purpose or alternatively, recklessly, or alternatively with gross negligence when they authorised the purchase of the Equipment from the Plaintiff by the First Defendant, knowing full well that the First Defendant would not be able to pay the full purchase price within the agreed period, and/or alternatively, in making written undertakings for the payment of the outstanding amounts, knowing full well that the First Defendant is not able to liquidate its debts, as and when they become due in the ordinary course of business.
> 2.8 Accordingly, the Second and Third defendants, are liable, jointly and severally, with the first defendant for payment of the sum of US$207 334.16 together with interest to the Plaintiff."

Clearly therefore, a literal reading of the summons and declaration reveals that the claim against the 1st defendant is based on contract. This is more so when regard is had to paragraphs 2.1, 2.2 and 2.5 of the declaration which traverses the claim against the 1st defendant in detail: that plaintiff and 1st defendant entered into an agreement of sale, clauses 2, 3, 4.1, 4.2, 7.1 and 7.2 of which in terms of which circumscribe the purchase price, payment terms and other ancillary matters, including the parties recourse upon breach.

However, it is also clear from the summons and declaration that the claim against 2nd and 3rd defendants is not based upon the contract of sale. Rather, as against 2nd defendant, the claim is based on his personal undertaking to assume the debt. And as against both 2nd and 3rd

defendants, the claim is based purely on the obligations of directors to act with probity as prescribed by s318.

Consequently, I find that 2nd and 3rd defendant's first ground of exception is ill founded.

Is a separate application for leave required before instituting an action against directors in terms of s318 of the Companies Act?

The 2nd and 3rd defendants' second ground of exception is that there is no cause of action against them as plaintiff did not seek and obtain leave of the court to sue them in their personal capacities as required by s318 of the Companies' Act. In any case, intention to defraud plaintiff by defendants has not been proven.

Section 318 provides as follows:

> **"318 Responsibility of directors and other persons for fraudulent conduct of business**
> (1) If at any time it appears that any business of a company was being carried on—
> (*a*) recklessly; or
> (*b*) with gross negligence; or
> (*c*) with intent to defraud any person or for any fraudulent purpose;
> the court may, on the application of the Master, or liquidator or judicial manager or any creditor of or contributory to the company, if it thinks it proper to do so, 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 aforesaid 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."

It is trite that directors can, despite the separate legal *persona* of their company, be held personally liable for the debts of the company provided the requirements of s318 (1) are satisfied.[1] However, it is also true that in order to hold a director personally liable, any creditor must apply to the court for a declaration that such director be so held personally liable for the debts or liabilities of the company. And in order to succeed, the creditor must show that the company was managed recklessly, or with gross negligence or fraudulently.

The question that arises therefore is, what does the law mean by "on the application of"? Does this mean that an application must be made in terms of Order 32 of the High Court Rules? The 2nd and 3rd defendants suggests so. The plaintiff on the hand contends otherwise: advancing the argument that in terms of the Interpretation Act [Chapter 1:01], even summons commencing action, seeking that anyone be held accountable in terms of s318 suffices.

The Interpretation Act provides in s5 as follows:

> **"5 Forms**

[1] See *David Govere & Another v Ordeco (Private) Limited* SC 225/13

> (1) Where a form is prescribed or specified by any enactment, deviations therefrom not materially affecting the substance nor calculated to mislead shall not invalidate the form used."

It seems to me therefore that while s318 talks of an application being made, the Interpretation Act allows for a wider interpretation of the word "application". Consequently, I am persuaded by plaintiff's submission that where one issues summons requiring a party to be held accountable in terms of s318, such summons is an appropriate "application" for purposes of s318. I am fortified in my view by the provisions of s15 of the Interpretation Act which provide as follows:

> **"15 References to applications and petitions**
> (1) Where an enactment requires or permits an application to be made to a court—
> (*a*) the application may be made to a judge, magistrate or other judicial officer of the court if rules of the court so provide; and
> (b) the application may be made in any appropriate form, whether by way of action, application or otherwise, permitted by rules of the court. (my emphasis)
> (2) Any reference in an enactment to a petition to a court shall be construed as a reference to an application to the court or to a judge, magistrate or other judicial officer of the court, made in accordance with rules of the court.
> (3) Where an enactment requires or permits anything to be done by way of action in a court, the thing may be done by any appropriate form of proceeding permitted by rules of the court."

While I agree with the 2nd and 3rd defendant that the judgment in *David Govere & Another* v *Ordeco (Private) Limited* (*supra*) is distinguishable in that the respondent had made an application on notice to declare appellant personally liable in terms of s318, nevertheless, I am not persuaded that it is necessary to actually file an application given my interpretation of s5 and 15 of the Interpretation Act.

Accordingly, I also find this ground of exception unmerited.

Must intention to defraud be proven in the pleadings before invoking S318?

Finally the 2nd and 3rd defendants averred that the summons and declaration were excipiable as disclosing no cause of action since no intention to defraud has been proven. In particular, since this alleged fraud is predicated on personal undertakings or guarantees which 2nd defendant allegedly gave, they argued that there can be no cause of action since no personal undertakings were made.

I believe this argument to be puerile. In so far as the submission that no allegation of fraud has been proven, and therefore there is no cause of action is concerned, it seems to me that 2nd and 3rd defendants have put the cart before the horse. It is trite that one is only obliged,

in the summons, to traverse the facts upon which the cause of action is based. The matter of proof of those facts is for the trial.

Further, it is a fact that 2nd defendant made a personal undertaking to pay the debt. The letter, Annexure 3, dated 7 February 2018, under his own signature, and at pages 13-14 of the record, which letter 2nd defendant does not disown, is apposite. Paragraph 2, 3 and the last sentence of para 4 are particularly pertinent, stating the following:

> "As a result of that I sold my property to settle your debt. We appreciate your professional approach as well as your patience. That is the reason why I had to sell my property to raise all the money due to you.
>
> The money is now to be paid from my personal resources rather than debtors as they are not quick enough.
>
> …….considering our commitment to pay you through this arrangement which we have told you."

While 3rd defendant never gave any personal undertakings, the claim against her is based purely on the basis of her position as a director in terms of s318. So whether or not she gave any personal undertaking is immaterial.

In the circumstances, I find that the exception is without merit.

Disposition

Consequently, it is ordered that

1. The 2nd and 3rd defendants' exception be ad is hereby dismissed with costs.
2. The defendants shall file their plea within ten (10) days of the date of this order.

Dube, Manikai & Hwacha, plaintiff's legal practitioners
Muronda Malinga Legal Practice, defendant's legal practitioners