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IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

REPUBLIC OF SOUTH AFRICA

Case Number: 15655/2014

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(1) REPORTABLE: ~~YES~~/NO

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

(3) REVISED

DATE: 3.7.2018

SIGNATURE: .....

In the matter between:

RALPH FARRELL LUTCHMAN N.O. — First Applicant

BAREND PETERSEN N.O. — Second Applicant

[In their capacity as joint liquidators of LEALA TRADING 107 (PTY) LTD (in liquidation).]

And

MARTINUS STEFANUS FERREIRA — Respondent

JUDGMENT

JANSE VAN NIEUWENHUIZEN J

[1] This is an application in terms of the provisions of section 424 of the now repealed Companies Act, 61 of 1973, which section has been retained in terms of the provisions of the Companies Act, 71 of 2008.

[2] Section 424(1) reads as follows:

> *"(1) 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."*

[3] In the present instance, the application is launched by the applicants ("liquidators") in their capacity as joint liquidators of Leala Trading 107 (Pty) Ltd ("the company"). The application is brought on the basis that the respondent, a director of the company, conducted the business of the company recklessly.

Background

[4] The Company was registered on 25 February 2009 and conducted business in the mining industry. Save for the respondent, the company had six other directors.

[5] The only asset of the company was several mining permits and prospecting rights for the mining of Gold Ore and Uranium Ore.

[6] The company did not have the necessary financial means to conduct mining operations and consequently entered into two agreements in order to realise the value attached to the mining rights, to wit:

i. On 10 April 2010 a Mining Management Agreement with Proudafrique Trading 225 (Pty) Ltd ("Proudafrique"), in terms of which Proudafrique would act as Mining Manager and would conduct mining operations to exploit current mining permits and all future mining operations; and

ii. On 13 August 2010 a Joint-venture Agreement with Shiva Uranium Limited ("Shiva"), in terms of which the parties would form a new company, which would in turn enter into a long-term contract to use Shiva's gold and uranium processing plant.

[7] In the result, Proudafrique would manage the mining operations and deliver the extracted ore to Shiva's plant to extract the gold from the ore. Shiva was responsible to sell the extracted gold to Rand Refineries who in turn paid the

proceeds of the sale to Shiva. Shiva then had to pay the monies so received to the company.

[8] In terms of the agreement with Proudafrique, Proudafrique would finance all costs pertaining to the mining operations.

[9] In consideration of the services rendered by Proudafrique, the company would firstly pay Proudafrique a remuneration calculated on the tonnage ore extracted and delivered to the company from the quarry stockpile floor. Secondly, Proudafrique would have received a percentage of the gross profit before tax from the sale of gold extracted from the mine.

[10] In order to pay Proudafrique, the company had to receive the proceeds from the sale of gold from Shiva. It is common cause that Shiva did not honour its payment obligation which led to the company's liquidation.

Allegations of reckless trading

[11] In respect of the respondent's dealings with Proudafrique, the liquidators allege that the respondent implemented the agreement with Proudafrique:

"11.6.3 without the banking arrangement contemplated in paragraph 37 of the MMA being implemented, despite Proudafrique's repeated insistence;

11.6.4 without ever having the intention to comply with and implement the bank arrangement agreed to as per clause 37 of the agreement and to this end

defrauded Proudafrique to enter into the MMA on the terms and stipulations contained in the particular agreement;

11.6.5 receiving the proceeds of the gold ore processed into the Company's (Leala Trading) bank account and disbursing those funds contrary to the provisions of the MMA and without the consent of Proudafrique."

[12] The respondent answered as follows to the above allegations:

"33.2 Contractually, it was Proudafrique's obligation to pay any and all expenses relating to the mining operations. Proudafrique breached this obligation by failing and/or refusing to make payment of all the monthly expenses incurred by Leala. This amounted to roughly R 500, 000. 00 per month.

33.3 Faced with Proudafrique's failure, Leala found itself in a position where it could not pay all of its creditors. As such, Leala needed control over the funds paid by Shiva to make sure that it could pay its creditors before splitting the proceeds with Proudafrique.

33.4 In acting in the aforesaid manner I certainly advanced the best interests of Leala and attempted to ensure that Leala's creditors were paid despite Proudafrique's breach of its contractual obligations."

[13] In respect of the agreement with Shiva, a long list of allegations of reckless conduct was relied upon. The liquidators' allegations and the respondent's answers thereto appear *infra*:

Liquidators:

"11.7 More in particular as far as the agreement with Shiva Uranium is concerned the Company and its executive director, the Respondent;

"11.7.1 Allowed the agreement between the Company and Shiva Uranium to be implemented;

11.7.1.1 without annexures B and C thereto to be completed, signed, initialled and attached to the agreement;"

Respondent:

"*51.1 The allegation that annexures "B" and "C" to the agreement with Shiva was not completed and signed is incorrect. All licenses and values were included in the contract. Planning for the two years commencing after date of conclusion of the agreement had been completed and were signed off by the representatives of Leala and Shiva.*"

Liquidators:

"11.7.1.2 without taking any steps either of Respondent's own accord or in conjunction with Shiva Uranium, to cause the new joint-venture Company to be formed;"

Respondent:

"*51.3 The joint venture was also in the process of being finalised. It was agreed that the joint venture would be known as Matlosana Gold Mining and a shareholders agreement had been completed and approved by Leala's directors and shareholders.*

51.4 The only outstanding issue was the approval of the new shareholders agreement by Shiva's representatives. We were told that the agreement had been handed to Mr Gupta for approval and that the joint venture would start conducting business during May / June 2011."

Liquidators:

"11.7.1.3 without causing the parties to subscribe for the shares as contemplated in paragraph 2 of the agreement;"

Respondent:

"52.1 I admit that the shares the parties would subscribed to, in terms of the original agreement had to change. These changes came about under circumstances where black economic empowerment targets set by government were not kept in mind when the initial percentages were negotiated.

52.2 To ensure that the business would comply with government's empowerment planning, the percentages had to be amended."

Liquidators:

"11.7.1.4 without causing the new joint-venture to operate independently of Shiva or the Company as contemplated by 2.4 of the agreement;

11.7.1.5 without taking any steps to have the mining rights/exploration rights contained in the contemplated annexures (addenda) A and B to be transferred to the new JV;"

Respondent:

"*54.1 I admit that the mining licenses / permits were not transferred to the new joint venture. Before any such step could even be contemplated, the shareholders agreement of the new joint venture had to be finalised.*

54.2 In addition to the above, the new joint venture had to be registered for VAT, tax, UIF and further statutory requirements had to take place. Only after all of the above had been completed could an application be submitted for the transfer of the rights / permits.

54.3 It would have been reckless to attempt to transfer any rights / permits before all the issues related to the joint venture had been finalised."

Liquidators:

"*11.7.1.6 without appointing or even attempting any steps to appoint a Paymaster to receive the proceeds of the sale of gold produced as contemplated by paragraph 9.2 of the agreement;*

11.7.1.7 without taking any reasonable steps or causing any steps to be taken to ensure that the proceeds of the gold produced, was received into an account controlled by or under the control of both Shiva and the Company, as contemplated in the agreement;

11.7.1.8 failing to take any steps to ensure receipt of the funds and its proper control as contemplated by the agreement with Shiva Uranium;"

Respondent:

"*37.1 I admit that monies paid by Rand Refineries were not paid into a paymaster account. Rand Refineries explained that the payments could only be made to the holder of the gold mining license. The gold mined at that stage came from the slag-dumps owned by Shiva and as such Rand Refineries made payment to Shiva.*

37.2 I engaged with Mr Jagdish Parekh, Shiva's representative, on more than one occasion concerning this issue as Leala found this situation untenable. Despite this fact the problem was not resolved."

Liquidators:

"*11.7.1.9 without disclosing and or accounting to Proudafrique for moneys actually received from Shiva Uranium.*"

Respondent:

"*56.1 Mr Jean Du Plessis, a director of Proudafrique, was given copies of the monthly bank statements into which Leala received payments from Shiva. The amount received was accordingly no secret.*

56.2 Leala's executive director, Mr van der Westhuizen, also provided Mr Du Plessis with documents related to the tonnage of gold bearing ore supplied to Shiva and the expected yield. Accordingly Proudafrique was fully informed of all business related to the gold supplied to Shiva."

Liquidators:

"*11.7.2 Allowed Shiva Uranium's officials to deny the Respondent and or other members by the Company's board access to and from the control of the mining and processing operations without taking any corrective steps to assert the Company's rights in and to the gold produced thereby;*

11.7.2.1 relinquishing the Company's access to and control over the process of causing gold to be delivered to Rand Refineries and to control payments to Shiva Uranium and the Company;

11.7.2.2 allowing Shiva Uranium to unilaterally decide on and control payments to the Company to the detriment of not only the Company but in turn Proudafrique and other creditors."

Respondent:

"*57.1 The statement that I allowed Shiva's officials to deny Leala's representatives access to the metallurgical plant is ludicrous. I took no steps to allow such denial.*"

[14] In view of the aforesaid answers supplied by the respondent, the liquidators in the replying affidavit, confined the allegation of reckless trading to the respondent's neglect to force Shiva to honour the terms of the agreement between the parties. This was also the line of argument advanced by Mr Groenewald, counsel for the liquidators, during argument.

LEGAL PRINCIPLES

[19] The Supreme Court of Appeal in *Fourie NO v Newton* [2011] 2 All SA 265 (SCA) at paragraphs [28] to [30] states as follows:

"*[28] The case against Newton is based on recklessness. The test for recklessness has both objective and subjective elements. It is objective, to the extent that the defendant's actions are measured against the standard of conduct of a notional reasonable person.*[1] *Accordingly, a defendant's honest but mistaken belief as to the prospects of payment of a claim by the company when due is not determinative of whether he was reckless; if a reasonable person or business in the same circumstances would not have held that belief, the defendant's bona fides is irrelevant.*[2] *The test is subjective, to the extent that it must be postulated that the notional person belongs to the same group or class as the defendant, moving in the same sphere and having the same knowledge or means of knowledge.*[3]

[29] Acting 'recklessly' consists in 'an entire failure to give consideration to the consequences of one's actions, in other words, an attitude of reckless disregard of such consequences'.[4] *In the context of s 424, the court should have regard, amongst other things, to the scope of operations of the company, the role, functions and powers of the directors, the amount of the debts, the extent of the company's financial difficulties and the prospects, if*

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[1] *Philotex (Pty) Ltd & others v Snyman & others; Braitex (Pty) Ltd & others v Snyman and others* [1997] ZASCA 92; 1998 (2) SA 138 (SCA) at 143G.

[2] *Philotex supra* at 147E.

[3] *Philotex* at 143G-H and 148E-H.

[4] *S v Dhlamini* 1988 (2) SA 302 (A) at 308D-E, applied in the corporate context in *Philotex* at 143F-G and *Ebrahim & another v Airport Cold Storage (Pty) Ltd* [2008] ZASCA 113; 2008 (6) SA 585 (SCA) para 14.

any, of recovery.[5] If when credit was incurred a reasonable man of business would have foreseen that there was a strong chance, falling short of a virtual certainty, that creditors would not be paid, recklessness is established.[6]

[30] A s 424 enquiry is typically one into commercial insolvency, as opposed to factual insolvency. As it was put by Goldstone JA in Ex parte De Villiers & another NNO: In re Carbon Developments (Pty) Ltd (in liquidation):[7]

> *'In short, the mere carrying on of business by directors does not constitute an implied representation to those with whom they do business that the assets of their company exceed its liabilities. The implied representation is no more than that the company will be able to pay its debts when they fall due.'*

And the question whether a company is unable to pay its debts when they fall due:

> *'[I]s always [a] question of fact to be decided as a matter of commercial reality in the light of all the circumstances of the case, and not merely by looking at the accounts and making a mechanical comparison of assets and liabilities. The situation must be viewed as it would be by someone operating in a practical business environment. This requires a consideration of the company's financial condition in its entirety, including the nature and circumstances of its activities, its assets and liabilities and the nature of them, cash on hand, monies procurable within a relatively*

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[5] *Fisheries Development Corporation of SA Ltd v Jorgensen & another; Fisheries Development Corporations of SA Ltd v A W J Investments (Pty) Ltd & others* 1980 (4) SA 156 (W) at 170B-C, approved in *Philotex* at 144B-D.

[6] *Philotex supra* at 147C.

[7] 1993 (1) SA 493 (A) at 504E-F.

short time, relative, that is, to the nature and demand of the debts and to the circumstances of the company including the nature of its business, by the sale of assets, or by way of loan and mortgage or pledge of assets, or by raising capital.[8]

As will appear from what is said hereunder, the passage just quoted is of particular significance in the present case."

[15] The question to be answered *in casu* is whether the respondent's failure to take appropriate legal action against Shiva for payment of the monies due and owing to the company was reckless.

[16] In order to determine the aforesaid question the time line pertaining to the mining operations envisaged in the agreements are significant.

[17] It appears from the evidence that mining operations only commenced in August 2010. Payments from Shiva was erractic and in some instances only a portion of the actual payment was received by the company. The company could as a result not honour its payment obligations to Proudafrique which led to Proudafrique's refusal to conduct further mining operations.

[18] Notwithstanding demands for payment made by the respondent, Shiva did not comply and the whole operation came to a standstill in March 2011. The

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[8] Blackman et al *Commentary on the Companies Act*, vol 3 14-130, relying on Australian authority.

company was left cash strapped and the directors, as a consequence, resolved in July 2011 to place the company in winding-up.

[19] Litigation is a cumbersome process that could take anything between two to three years to finalise. In the section 416 and 417 enquiry, when asked why the directors decided to place the company in winding-up, the respondent answered as follows:

"Mnr Ferreira: *Ons het geen fondse gehad op daai stadium nie. Die Prokureurskostes en verdere regskostes was vir ons bietjie hoog. Omdat ons nou 'n klomp geld verloor het met die hele proses by Shiva, was ons 'n klomp miljoen rand uit "pocket" uit en wat ek nie geld gehad het hom ... of nie een van die Direkteure het geld op daai stadium gehad om daai roete te gaan nie en na beleg met van die konsultante en so aan het ons besluit en gesê dis die beste, dat ons maar die ..."*

[20] Objectively viewed, and measured against the standard of conduct of a notional reasonable person in the respondent's position, I do not consider his failure to institute legal action against Shiva as being reckless in the circumstances. One should also bear in mind that the respondent was not the only director of the company.

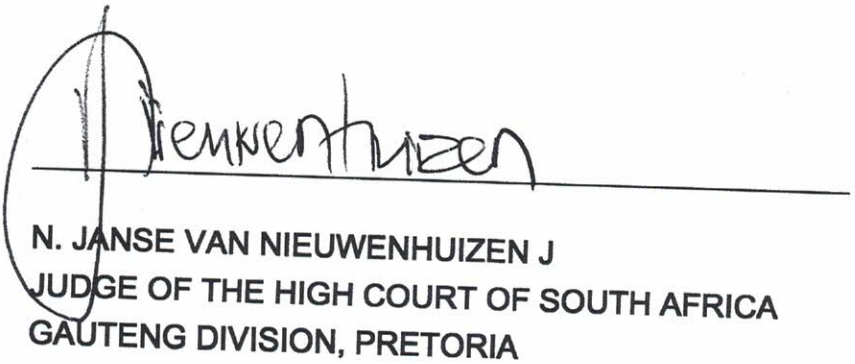
[21] The respondent's evidence referred to *supra* clearly indicates that all the directors of the company were involved in finding a resolution to the company's problems. The directors jointly resolved that the best option would be to place the company in voluntary winding-up.

[22] In the result, the application must fail.

ORDER

[23] In the premises, I grant the following order:

The application is dismissed with costs.



N. JANSE VAN NIEUWENHUIZEN J
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

DATE HEARD	28 May 2018
JUDGMENT DELIVERED	3 July 2018

APPEARANCES

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