Case No 283/92

IN THE SUPREME Court OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

DON SAMUEL OZINSKY NO

APPELLANT

and

LINDA M LLOYD FIRST RESPONDENT
ROSS LINDORIS MALLEN SECOND RESPONDENT
JAMES ALLEN LLOYD THIRD RESPONDENT

CORAM: JOUBERT, E M GROSSKOPF, NESTADT, NIENABER et HOWIE JJA

HEARD: 15 FEBRUARY 1995

DELIVERED: 29 MARCH 1995

J U D G M E N T

NIENABER JA

NIENABER JA:

The appellant is the liquidator of a company, Hi-Class Kitchens (Atlantis) (Pty) Ltd (to which I shall refer as "Atlantis"). He was the plaintiff in the Court below. I shall continue to refer to him as such. The three respondents in the appeal (henceforth referred to as "the defendants") were directors of Atlantis and of its sister company, Hi-Class Kitchens (Pty) Ltd ("Kitchens"). Atlantis's business consisted of the design, manufacture and installation of household kitchen cupboards and fittings of high quality. Kitchens was responsible for the marketing of the products. Both companies were liquidated at the instance of the Lloyd Family Trust (which was controlled by the first and third defendants), provisionally on 5 December 1986 and finally on 25 February 1987. This was a stratagem to pre-empt an application for liquidation by one of Atlantis's main trade creditors, PG Wood Ltd ("PG Wood"). PG Wood is the catalyst for and the promoter of the present litigation. In it the plaintiff, on the instructions of the creditors, seeks an order in terms of s 424(1) of the Companies Act 61 of 1973

declaring the three defendants personally liable "for all or any part of the debts or other liabilities of the company to an amount of R226 188,40". This is the amount, broadly speaking, by which Atlantis's liabilities exceeded its assets at the time of liquidation. (The litigation relates solely to Atlantis; the plaintiff was not the liquidator of Kitchens and PG Wood was not its creditor.) The action was heard by Van Deventer J in the Cape Provincial Division. It failed. The judgment is reported s.v. Ozinsky NO v Lloyd and Others 1992 (3) SA 396 (C). I shall refer to it as "the reported judgment". This is an appeal, with leave from the Court a quo, against the refusal of the relief sought by the plaintiff.

Section 424(1) of the Act reads 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."

There are two parts to the body of this section: (1) the business of the company must be carried on in a certain manner i.e. (i) recklessly or (ii) with intent to defraud creditors (of the company or of any other person) or (iii) for any fraudulent purpose; and

(2) the person concerned must (a) be a party to the carrying on of the business (cf Howard v Herrigel and Another NNO 1991 (2) SA 660 (A) 674G-I) and (b) have knowledge of the facts from which the conclusion is properly to be drawn that the business of the company was or is being carried on (i) recklessly or (ii) with intent to defraud creditors (of the company or of any other person) or (iii) for any fraudulent purpose (Howard v Herrigel and Another supra 673I-J).

The case on the pleadings was that all three defendants were parties to the carrying on of the business of the company either recklessly or with intent to defraud creditors of the company and that all three did so with knowledge that the affairs of the company were being conducted in that

fashion. The pleadings are summarised in the reported judgment at 398H-399H. The gist is that the defendants, knowing that Atlantis was trading in insolvent circumstances, (a) permitted it to incur debts when there was no reasonable prospect of payments being made when due, alternatively, (b) adopted a policy towards the payment of the company's debts which was grossly unreasonable and prejudicial to the company and its debtors, and/or (c) deceived creditors into believing that the company had cash flow problems (in order to induce them to extend credit to the company which, on liquidation, became irrecoverable) when the company in fact experienced no such problems.

It was common cause during the trial that the defendants, after 1 March 1986, knew that Atlantis's liabilities exceeded its assets and that they nevertheless permitted the company to incur further debts, such as those of PG Wood and Designaire (Pty) Ltd ("Designaire"), eventually totalling R24 837,78 and R15 530,33 respectively; that the defendants, at the time when such debts were incurred, did not advise the creditors concerned that

the company's liabilities exceeded its assets; and that PG Wood and Designaire were told by the second defendant that the company experienced cash flow problems.

On the strength of a series of judgments delivered by Stegmann J those facts, in themselves, may well have rendered the defendants liable in terms of the section. Those cases are: Ex parte Lebowa Development Corporation Ltd 1989 (3) SA 71 (T); Singer NO v MJ Greeff Electrical Contractors (Pty) Ltd 1990 (1) SA 530 (W); Ex parte De Villiers NO: In re MSL Publications (Pty) Ltd (in liquidation) 1990 (4) SA 59 (W); Ex parte De Villiers and Another NNO: In re Carbon Developments (Pty) Ltd (in liquidation) 1992 (2) SA 95 (W).

The Court a quo disagreed with the premises of law expressed in the above cases, viz that trading by a company in insolvent circumstances except on a cash basis is per se dishonest and unlawful; and that directors of a company of which the liabilities exceed the assets are under a general duty to disclose its de facto insolvency to a seller before accepting goods on

credit (417B-E; 419C-D). The views thus expressed by the Court a quo were vindicated by a subsequently delivered judgment of this Court, Ex parte De Villiers and Another NNO: In re Carbon Developments (Pty) Ltd (in liquidation) 1993 (1) SA 493 (A), which, by disagreeing with Stegmann J (at 503C-504F), settled these points either expressly or by implication.

On the factual issue, viz the state of mind of the defendants, the Court a quo found that their actions were neither reckless nor fraudulent. The first defendant, so it was found,

> "remained determined to the end to make a success of the business and ... intended to invest and would have invested all the capital that the business might have required to pay its current trade creditors up to the date of liquidation" (411F-G) and,
> "never even contemplated the possibility of liquidation. She had full confidence in the viability of the business and remained determined to provide all the capital that might be required to make it a successful venture." (411I-J).

The second defendant, according to the Court a quo, had absolute faith in the first defendant's determination and financial resources and there was no

reason to believe, so it was held, that he ever had "the slightest doubt that the company's creditors would be paid" (412A-B). The third defendant, so the Court a quo found on the probabilities, likewise had faith in the first defendant's resources. His view of the future of the company would not have differed materially from that of the second defendant (412D). At 407B-C the Court said:

> "The third defendant did not testify, but no issue was made of this and it was accepted by Mr Nelson [for the plaintiff] that third defendant had played no active role whatsoever in the management of the company and had concurred in all decisions made by first defendant, who remained the driving force behind the venture and was solely in control of the company's financial requirements."

In short, so it was held, none of the three defendants acted in contravention of the provisions of the section.

Faced with the judgment of this Court in the Carbon Developments case supra, it was no longer feasible for the plaintiff to argue that s 424(1) was contravened simply because the directors failed to reveal to potential creditors, when arranging credit, that the company's liabilities exceeded its

assets. The plaintiff was moreover confronted with the strong credibility findings made by the Court a quo on the demeanour and contents of the evidence of the first defendant. The finding that she had faith in the future of the company and had every intention of ensuring that all debts would in due course be paid, backed as it was by the not inconsiderable resources readily available to her in the United States of America, made it awkward for the plaintiff to argue that she conducted the affairs of the company with intent to defraud its creditors. So too, it would have been somewhat unrealistic to attempt to persuade this Court to reverse the finding of the Court a quo that the second defendant, although not as good a witness as the first defendant, honestly believed that the company had a future and that all debts incurred would in due course be met. Consequently there was, if not in the initial heads of argument filed on behalf of the plaintiff then in the actual argument addressed to this Court, a volte-face. The new argument, briefly stated, was this: The third defendant, unlike the first and second defendants, did not testify; his failure to do so justified the inference, when

assessed in the light of the evidence as a whole, that by mid 1986 he had lost faith in the future of the business; he thereupon manipulated the affairs of the company and manoeuvred it into liquidation for the sole purpose of reducing both his loan account and his exposure to suretyships to which he and the first defendant had committed themselves in favour of certain creditors of the two companies. He therefore carried on the business of Atlantis with the intent to defraud at least some of the creditors, more particularly those without suretyships, such as PG Wood; and to the extent that the first and second defendants allowed themselves to be so manipulated they carried on the business of the company recklessly.

To assess the soundness of this argument it is helpful to highlight some of the circumstances of the case. The reported judgment contains an extensive and accurate narrative of events and it is unnecessary to cover the same ground with the same degree of detail. I mention only the following facts:

1) The three defendants are related. The first defendant is the wife of

the third defendant and the sister of the second defendant.

2) Kitchens was formed and commenced trading in 1984. The third defendant who conceived the idea was the moving force behind the enterprise and in the company register he was described as its managing director.

3) Kitchens had a purely nominal share capital of R300,00 and its operations were financed by loans from the first and third defendant and by a substantial bank overdraft. In the financial statements for 28 February 1985 the first defendant's loan account stood at R78 092,44 and that of the third defendant at R47 277,77.

4) Kitchens's factory was located in Observatory and its show rooms in Bree Street, both within the Cape Town metropolitan area. Towards the end of 1984 it was decided, for a variety of reasons which appeared to the first and third defendants to be sound, to relocate the factory to Atlantis, an industrial town approximately 45 km from the centre of Cape Town.

5) A new company (Atlantis) was incorporated in 1984 for the specific purpose of taking over the manufacturing arm of the business. It commenced

trading on 1 March 1985. A factory was erected at Atlantis at a cost of approximately R450 000,00. It was built and owned by the Lloyd Family Trust which was created for that very purpose with funds channelled to it from money which the first defendant had inherited in the United States of America. The factory was leased to Atlantis by the Lloyd Family Trust at an agreed rental.

6) In time the first defendant became more and the third defendant less directly involved in the business. The first defendant assumed a managerial position and introduced her brother, the second defendant, and his wife into the business.

7) Atlantis commenced its manufacturing operations during May 1985. All three defendants were directors of both Kitchens and Atlantis. The first defendant was in charge of the marketing at Bree Street and the second defendant of manufacturing at Atlantis. As such the second defendant dealt with the trade creditors, including PG Wood.

8) Early in 1986 the third defendant resumed his career as a jet pilot.

Thereafter he was no longer actively engaged in the day to day activities of the companies, although he retained his interest in them and attended meetings with bank officials. As at 28 February 1986 his loan account in Atlantis stood at R22 914,31. According to the first defendant she kept him informed on a daily basis "of the problems" of the business.

9) The two companies operated on an escalating overdraft. The overdrafts were secured by suretyships from first and third defendants as well as by a bond over their residential property at Llandudno. In addition the first and third defendants also stood surety for the payment of Atlantis's debts to certain trade creditors. PG Wood was not one of them.

10) Although trade was brisk the companies were operating at a loss. The move to Atlantis was not an unqualified success. Subsidies promised to them by the Decentralisation Board as an incentive to relocate to Atlantis, were not forthcoming; skilled labour was not readily available and had to be transported from Cape Town on a daily basis; difficulties were experienced with the supply of raw materials; the economic climate was poor and

competition was fierce.

9) Without the first defendant's financial support, by way of advances on loan account, the companies would not have survived. Both her loan account and the bank overdrafts increased rapidly. By arrangement with the bank manager a bond over the Atlantis property was secured, the proceeds of which were used to reduce the companies' overdrafts.

10) During March 1986 the auditor of Kitchens told the directors that the liabilities of Kitchens exceeded its assets and that, technically speaking, it was insolvent. At his suggestion they signed subordination agreements whereby their claims on loan account against Kitchens were to rank below those of ordinary concurrent creditors. The directors were also warned that they ran the risk of personal liability if matters did not improve.

11) Several remedial measures were discussed. On the financial side the defendants, in consultation with their bank manager and auditor, decided on a capital reconstruction scheme, increasing the authorised share capital from R300,00 to R450 000,00 and converting a portion of their loan accounts

to equity. This scheme, if implemented, would have resulted in that portion of the loan account no longer competing with the claims of ordinary concurrent creditors. It was furthermore proposed that new shares to the value of R130 000,00 be taken up by way of a financial rand investment by a Mr Sullivan, a close friend of the Lloyds, who was resident in the United Kingdom. Application was made to the Reserve Bank for treasury permission to introduce this sum into the country. Pending its outcome the capital reconstruction scheme was held in abeyance. (As it happened the application was overtaken by the provisional winding up order.) It was also decided, in consultation with the bank manager, to practise strict financial discipline by not allowing the combined overdrafts of the two companies to exceed R50 000,00 even though a facility of R180 000,00 remained on the books. On the trading side several schemes were mooted e.g. a diversification of the business; an increase in the price of upmarket units; the cutting of costs; the retrenchment of certain employees, and so forth. Turnover increased, resulting, for the first time during October 1986, in a

slight trading profit. In the meantime the second defendant and his wife did not draw a salary for a period of some three months; no directors' remuneration was paid; and the Lloyd Family Trust received no rental for the use by Atlantis of the Atlantis premises.

12) Even so, both companies were in financial straits. Payments, meticulously made until about July 1986, began to lag. Accounts had to be juggled. Promises of prompt payment made, for instance, to Designaire were not kept.

13) It was during this period, October 1986, that Mr Lockyear, PG Wood's credit controller, refused Atlantis further credit. The story of what in the reported jugment is termed "the PG Wood saga" is told at pages 407G-409H thereof. PG Wood was a regular supplier on credit of raw material to Atlantis and, until July 1986, Atlantis was a regular payer of what it owed PG Wood. But in October 1986, after Atlantis had fallen behind with its payments, Lockyear confronted the first defendant at the Bree Street show room and berated her in the presence of customers. She reported the incident

to the second defendant who made an appointment to see Mr Watson-Smith, PG Wood's chief executive, to complain about Lockyear's boorish behaviour. In the result Atlantis's credit was restored. Some time thereafter Lockyear met the second defendant. According to the second defendant he gave Lockyear two currently dated cheques, each for approximately Rll 000,00, on the understanding that Lockyear would not deposit either cheque until he had been advised that funds were available to meet it. Lockyear did not testify to contradict the second defendant's evidence but on the latter's own showing under cross-examination it is questionable whether a clear agreement was proved that Lockyear would not deposit the cheques until it suited the second defendant that he should do so. Nevertheless there must have been some arrangement or concession by Lockyear for otherwise, as the Court a quo observed (408G-H), it is inconceivable that two similarly dated cheques, each for approximately half the amount owing, would have been tendered by the second defendant and accepted by Lockyear. The second defendant anticipated, so he said, that he would notify Lockyear within a month or so

that the cheques could be deposited. But Lockyear did not wait. He presented the cheques forthwith. Payment of the cheques by the bank would have boosted the overdraft beyond the self-imposed limit of R50 000,00. When the bank manager telephoned the second defendant to inform him that the cheques had been presented for payment, the second defendant was so irked that he instructed the bank to dishonour them. What the second defendant did not foresee was that this decision would precipitate the liquidation of the companies. At worst he thought that PG Wood would issue summons, whereupon the demand for payment would have been met. When to his horror rumour reached him through the bank that PG Wood aimed to liquidate Atlantis, he immediately alerted the first defendant. She consulted their then attorney, Horak. Horak made enquiries and confirmed that an application for liquidation was imminent. His advice to the first and second defendants was to seize the initiative and to have the companies placed in liquidation so that - ironically - they would be assured of the appointment of a sympathetic liquidator. According to the first and second

defendants they did not believe that they had any option but to comply with this advice. It never occurred to them, nor were they advised, that they could stave off liquidation by settling PG Wood's claim. As it happened, such advice might in any event not have had the desired effect for as the Court a quo pointed out (424D-E), an offer of payment to PG Wood at that late stage might well not have deflected the latter's application for liquidation. The defendants' decision to opt for liquidation was taken shortly before 1 December 1986. By then the PG Wood application for liquidation had already been prepared. It was served on 2 December for hearing on the 9th. The Lloyd Family Trust's application for the liquidation of the two companies was dated 3 December. It is the latter application that proceeded on 5 December 1986.

16) Thereafter matters took their course. Both companies were provisionally liquidated. The first and third defendant settled the debts for which they stood surety, which did not include PG Wood's claim.

Against that factual background I return to the points made in argument

against each of the defendants.

I begin with the first defendant. The Court a quo accepted her evidence that she retained her faith in the future of both companies; that she would have ensured, if needs be from her own resources, that all debts were met; and that it was only with reluctance that she was persuaded to move for the liquidation of the companies. These findings are clearly right. All the first defendant's efforts were geared to the companies' success: she injected massive funds into the business; she placed her own assets at its disposal; she stood surety for its debts; she worked for the companies tirelessly and without remuneration and she was grimly determined that the business should succeed. The steps she initiated to introduce Sullivan into the business as a foreign investor and the share capital reconstruction scheme that was envisaged, further support that view. These facts leave little scope for the argument that the first defendant acted with the intent to defraud Atlantis's creditors. Nor can it be said that her conduct of or approach to the business was reckless, in the accepted sense of extreme lack of interest or extreme

negligence (cf S v Goertz 1980 (1) SA 269 (C) 271H-272B; S v Parsons en 'n Ander 1980 (2) SA 397 (D) 400G-H; Fisheries Development Corporation of SA Ltd v Jorgensen and Another; Fisheries Development Corporation of SA Ltd v AWJ Investments (Pry) Ltd and Others 1980 (4) SA 156 (W) 169A-170D; Anderson and Others v Dickson and Another NNO (Intermenua (Pty) Ltd intervening) 1985 (1) SA 93 (N) 110D-H). Her managerial decisions, even those shown after the event to have been unwise, were not unbusinesslike or irresponsible; the failure of the companies was due to external rather than to internal forces; and there was nothing to indicate that she abused her position in the companies, that she was inattentive to their affairs, or that she allowed herself to be browbeaten by the third defendant against her own better judgment. It was also argued in this Court that the first defendant should have ensured, after liquidation, that all Atlantis's creditors be paid in full and not merely those with suretyships and that the first defendant's failure to do so was a manifestation of her contemptuous or at least cavalier attitude towards those creditors.

There is no warrant in the evidence for such a submission. Everything points to the first defendant's deep commitment to the companies and her genuine distress upon their demise. But once liquidation had supervened, even though she toyed with the notion of making an offer of compromise, there was no obligation on her to resurrect Atlantis and her failure to do so does not reflect adversely on her. There was, in a word, no case against her.

The second defendant dealt with trade creditors. His decision to instruct the bank to dishonour the two PG Wood cheques was a critical error of judgment. He may even have been a little duplicitous in his dealings with Designaire and naive in his dealings with the Receiver of Revenue. But once his testimony was accepted that he had confidence in and a commitment to the future of the business and had reason to believe that the companies would be able to trade out of their financial difficulties, with the result that all debts would eventually be paid, he, too, like the first defendant, cannot be said to have acted with the intent to defraud some or all of Atlantis's creditors. He admitted that he advised PG Wood and Designaire that Atlantis was

experiencing cash flow problems. In a trading sense it was. His efforts to have payments delayed until funds became available from the Decentralization Board or from Sullivan's investment or, as a last resort, from the first defendant, cannot be branded as being purposefully fraudulent. And while his style of management is open to greater censure than that of the first defendant, it falls far short of recklessness as contemplated by the section. As in the case of the first defendant it was never put to him or proved that he was a mere tool in the hands of the third defendant.

Turning to the third defendant, the submission was that he conducted the affairs of Atlantis with intent to defraud Atlantis's creditors, more specifically PG Wood and Designaire. It was submitted, as stated earlier in this judgment, that the third defendant had designs of his own: unlike the first and second defendants he had, by mid 1986, lost faith in the business; all his efforts thereafter were funnelled into extracting money from the companies in reduction of his loan account and into extricating himself from liability under his suretyships to certain creditors, without regard to the

interests of other creditors. In his own right, so it was argued, he carried on the affairs of Atlantis and he did so with the intention, independent of his co-directors, of defrauding the company's creditors. That inference, it was further submitted, is justified by certain objective facts, taken in conjunction with his failure to testify when he was available to do so. The objective facts were these: whereas the February 1985 financial statements showed his loan account to be about R47 000,00 in Kitchens, this is no longer reflected in the February 1986 financial statements; so too, his loan account of some R23 000,00 in Atlantis in February 1986 was reduced to R15 000,00 in December 1986. The bank overdraft, for which he stood surety, was considerably reduced by the proceeds of the bond taken out by the Lloyd Family Trust over the Atlantis property. He concurred in the decision to liquidate the company.

Two questions arise: First, was he a party to the carrying on of the business of Atlantis? Second, did he do so with the intent to defraud its creditors?

On the facts it is arguable that, strictly speaking, he did not carry on the business of the company. The management of the business, at least since 1986, was conducted by the first defendant on the marketing side and by the second defendant on the manufacturing side. From early 1986 the third defendant effectively withdrew from the day to day operations of the business, while pursuing his career as a commercial pilot in Johannesburg. There is nothing in the evidence to suggest that the third defendant, sidelined as he was, took any action independently of his co-directors and if the suggestion is that he was able at a distance to influence his co-directors wittingly or unwittingly to serve his own ends, it has no foundation in the facts. But what is true is that the third defendant did not sever his ties with the companies. He stayed on as a director. He remained in touch with the affairs of the companies through his wife, the first defendant. He attended sundry meetings with the companies' auditors and bankers. He became, in large measure, a passive but not an uninterested bystander. In Howard v Herrigel and Another NNO supra 674G-I it was said:

> "In my opinion it follows that, when the person sought to be held liable under s 424(1) is a director, he may well be a 'party' to the reckless or fraudulent conduct of the company's business even in the absence of some positive steps by him in the carrying on of the company's business. His supine attitude may, I suppose, even amount to concurrence in that conduct. Whether such an inference could properly be drawn would depend upon the facts and circumstances of the particular case."

On the strength of this dictum the third defendant was sufficiently involved in the business of Atlantis as a director that he can fairly be said to have been a party to the carrying on thereof.

The second question is whether he had the intention, adverse to that of his co-directors but masterminding them, of defrauding the creditors of the company. It was never suggested in evidence to any of the witnesses on either side that, Svengali-like, he was able to manipulate his co-directors to extract money from Atlantis and to reduce his exposure in terms of his suretyships. There is nothing in the evidence to suggest that the third

defendant was responsible for or even a party to any decision to select for payment only those creditors for whom he stood surety and to ignore the others; or that it was decided not to pay PG Wood because payment to it would increase Atlantis's overdraft and hence the third defendant's liability as surety to the bank. Those decisions were hands-on decisions taken by the second defendant without intervention or influence from the third defendant. In any event, if that was the third defendant's covert scheme, it was singularly unsuccessful. At the time of liquidation his loan account with Atlantis was still in credit (making him only a concurrent creditor) and he remained liable as surety to the bank and to Federated Timbers (another supplier of raw materials to Atlantis).

In short, it was not established that the third defendant had an independent and fraudulent state of mind to benefit himself at the expense of the creditors of Atlantis generally and of PG Wood and Designate in

particular. But the third defendant would not only be liable if he had a fraudulent state of mind independent of that of the first and second defendants; he would also be liable if, in being a party to the carrying on of the business, he knew that his co-directors harboured such an intent or had acted recklessly. That pre-supposes, however, that the first and second defendants either had the intention of defrauding the creditors concerned or that they had acted recklessly. For the reasons stated earlier in the judgment neither requirement has been established. On that basis the third defendant can likewise not be held liable.

No case in terms of s 424(1) of the Act was made out against any of the three defendants. The Court a quo was right. The appeal is dismissed with costs.

P M Nienaber
Judge of Appeal

Joubert JA)
E M Grosskopf JA) Concur Nestadt
JA) Howie JA)