

**N THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO: D10021/2018

In the matter between:-

**IOANNIS RAFTELIS N.O. (in his capacity as
Trustee of the Raftelis Trading Trust) FIRST PLAINTIFF**

IOANNIS RAFTELIS SECOND PLAINTIFF

**IRENE RAFTELIS N.O. (in her capacity as
Trustee of the Raftelis Trading Trust) THIRD PLAINTIFF**

**GARY BRIAN KLINKRADT (representing
K.A. Administrators (Pty) Limited in his
capacity as Trustee of the Raftelis Trading Trust) FOURTH PLAINTIFF**

and

AFROPULSE 477 (PTY) LIMITED FIRST DEFENDANT

MOHAMED EBRAHIM AMOD SECOND DEFENDANT

IRSHAD EBRAHIM AMOD THIRD DEFENDANT

**REAL ESTATE FRANCHISE COMPANY
(PTY) LIMITED FOURTH DEFENDANT**

ORDER

1. The first Special Plea of misjoinder is upheld.

2. The Plaintiffs are directed to pay the costs of the Second and Third Defendants jointly and severally, the one paying the other to be absolved.

JUDGMENT

SINGH, AJ:

1. The first, third and fourth plaintiffs act as trustees of the Raftelis Trading Trust (“Raftelis”) which was incorporated in terms of the trust laws of the Republic of South Africa. The first defendant is a private company registered and incorporated in accordance in terms of the company laws of South Africa with the second and third defendants being the directors of the first defendant. The fourth defendant acted as a broker in respect of two (2) agreements concluded by the plaintiffs with the first defendant.
2. During or about December 2017, the first plaintiff in his capacity as trustee of Raftelis entered into an Agreement of Purchase and Sale with the first defendant whereby the first defendant sold the business described as Sasol Isethebe (“the business”) to Raftelis.

3. Subsequent to entering into the Agreement of Purchase and Sale, the second plaintiff in his personal capacity and on 18 December 2017 concluded a Management Agreement with the first defendant. The Management Agreement was to allow the second plaintiff to participate in the business of the first defendant against payment of the sum of R4 880 400,00. The sum of R4 424 400,00 was to be paid into the trust account of the fourth defendant and the balance of R456 000,00 would be retained in the fourth defendant's trust account pending transfer of the business to Raftelis.
4. The Management Agreement clearly refers to the parties as being the second plaintiff and the first defendant. The Management Agreement was signed by the second plaintiff personally and by the second defendant on behalf of the first defendant.
5. Provision was made in the Management Agreement that as consideration for the second plaintiff's participation in the business, the first defendant was to pay forty nine percent of the net monthly profits of the business to the second plaintiff. The second plaintiff liquidated certain local and offshore investments in order to meet his obligations in terms of both the Purchase and Sale Agreement and the Management Agreement. The second plaintiff took occupation of the business and commenced participation therein during or about January 2018.

6. The second plaintiff alleged that the first defendant had not discharged its obligation to furnish the second plaintiff with an updated set of management accounts and Statement of Assets and Liabilities as was agreed to in paragraph 7 of Annexure “D” and paragraph 4 of Annexure “E” to the Management Agreement. The first plaintiff was to secure a loan from a registered bank or financial institution and the first defendant failed to furnish the second plaintiff with the necessary documents, resulting in the loan which was to be granted by the financial institution, being withdrawn.

7. The second plaintiff further alleged that the second defendant provided only the information pleaded in paragraph 21 of the Particulars of Claim regarding the net profit, average pumped volumes of fuel, profit from the sales of fuel, income from the Sasol shop and profit from the Sasol shop on a monthly basis. Since taking occupation of the business in January 2018, the second plaintiff alleged that he found that the information provided by the second defendant in respect of the business was significantly exaggerated.

8. The plaintiffs pleaded that the only reasonable inference to be drawn from the failure to provide the updated management accounts to verify the actual performance of the business was that the second defendant intentionally or negligently misrepresented the performance of the business in order to make it appear more attractive to the second plaintiff than it actually was thus inducing him to enter into the Purchase

and Sale Agreement. These allegations are contained in paragraph 22 of the plaintiffs' Particulars of Claim.

9. The plaintiff alleged further at paragraphs 23 and 24 of the Particulars of Claim that the relationship between the second defendant and second plaintiff deteriorated from the time he started questioning the performance of the business. Thereafter and on 25 July 2018; the first defendant instructed the Manager of the business to take the second plaintiff's keys to the business away from him. The plaintiffs alleged that this amounted to a repudiation of the Management Agreement by the first defendant as it rendered it impossible for the second plaintiff to participate in the management of the business and discharge his duties and responsibilities as contemplated in the Management Agreement.
10. The plaintiffs accordingly instituted the present action wherein they sought *inter alia* cancellation of the Sale and Management Agreements and payment of the amounts referred to in prayers (b), (c), (d), (e) and (f) of the Particulars of Claim.
11. The first to third defendants delivered their Plea and raised two Special Pleas, one of them being, a Special Plea of misjoinder of the second and third Defendants because there was no basis pleaded in the Particulars of Claim for their personal liability to the Plaintiffs.

12. I have been asked to determine whether the second and third defendants have been misjoined as directors.

13. Section 19 of the Companies Act No. 71 of 2008 (“the 2008 Act”) which deals with the legal status of companies is the starting point in order to consider whether the second and third defendants are personally liable to the plaintiffs for their claim. Except to the extent that the 2008 Act or Memorandum of Incorporation of a Company states what the liability of a director is, a director is not solely liable for the obligations and liabilities of a company.

14. A company has its own legal persona quite separate from that of its directors^{1, 2}.

15. Section 424 of the Companies Act 61 of 1973 (“the old Act”) stated expressly the directors “shall be personally responsible, without limitation of liability for all or any debts or other liabilities” of the company when the business has been carried on recklessly or with intent to defraud creditors. A Court however had to specifically make such a declaration.

¹ Section 19(2) of the Companies Act 21 of 2008

² Hlumisa Investment Holdings RF Limited and Another v Kirkinis and Others
2020 (5) SA
419 (SCA) at paragraph 42

16. Section 22(1) of the 2008 Act prohibits a company from carrying on its business recklessly with “gross negligence, with intent to defraud any person, or for a fraudulent purpose”. If the Companies and Intellectual Property Commission (“the Commission”) has reasonable grounds to believe that the company is engaging in conduct which is prohibited in S22(1), it is entitled to issue a Notice to the company to show cause why the company should be permitted to carry on business.

17. The provisions of S22 do not state that a director will be held liable for acting in a manner stipulated in S22(1).

18. Section 77(2) of the 2008 Act reads as follows:

A director of a company may be held liable –

(a) in accordance with the principles of the common law relating to breach of a fiduciary duty, for any loss, damages or costs sustained by the company as a consequence of any breach by the director of a duty contemplated in Section 75, 76(2) or section 76(3)(a) or (b); or

(b) in accordance with the principles of the common law relating to delict for any loss, damages or costs sustained by the company as a consequence of any breach by the director of –

(i) a duty contemplated in section 76(3)(c);

(ii) any provision of this Act not otherwise mentioned in this section; or

(iii) any provision of the company's Memorandum of Incorporation."

19. Section 77(3) sets out the circumstances where a director is liable for loss, damages or costs sustained **by the company** [my emphasis] as a result of direct or indirect conduct on the part of the director. From a plain reading of S77(3), no liability to third parties such as creditors for debts or liabilities may be imputed to a Director. In the case of *Gihwala and Others v Grancy Property Limited and Others*³, the Supreme Court of Appeal held that Section 77(3) may not be invoked by a creditor to secure payment. It is only a company which may invoke these provisions against a director.

20. Section 218 of the 2008 Act pertains to civil actions and Section 218(2) reads as follows:-

Any person who contravenes any provisions of this Act is liable to any other person for any loss or damage suffered by that person as a result of that contravention."

21. In *Chemfit Fine Chemicals (Pty) Limited v Maake*⁴ it was stated that liability in terms of Section 218(2) of the 2008 Act "ensues as a result of any contravention, and therefore such ordinary common law requirements for liability as fault or wrongfulness are dispensed with".

³ 2017 (2) SA 337 at paragraph 20

⁴ 2017 JDR 1473 (LP) at paragraph 30

The Court in the Chemfit case aligned itself with the dictum of the Court in the case of Rabinowitz v Van Graan and Others⁵ and proceeded to find that “any conduct that contravenes the provision of the Act, catapults any person, including the directors to personal liability”⁶.

22. In the case of De Bruyn v Steinhoff International Holdings NV and Others⁷ the Court made certain remarks orbiter regarding Sections 22(1) and 218(2) of the 2008 Act. Like in the Hlumisa case supra, the shareholders sought relief against certain directors. This of course differs from the present matter where the plaintiffs are not shareholders of the first defendant with reference to claims by third parties against directors, the following was said at paragraph 191:-

“Section 218 should not be interpreted in a literal way. Rather the provision recognizes that liability for loss or damage may arise from contraventions of the Companies Act. And so, the statute confers a right of action. But what that right consists of, who enjoys the right, and against whom the right may be exercised, are all issues to be resolved by reference to the substantive provisions of the Companies Act.”

23. At paragraph 192, Unterhalter J remarked as follows:-

“Such an interpretation answers another difficulty that the literal interpretation of S218(2) does not. As Hlumisa observed, can Section 218(2) be understood to impose liability without regulating concepts of

⁵ 2013 (5) SA 315 (GSJ)

⁶ Chemfit Fine Chemicals (Pty) Limited v Maake 2017 JDR 1473 (LP) at paragraph 35

⁷ 2022 (1) SA 442 (GJ)

fault, foreseeability and remoteness and an undifferentiated conception of permissible Plaintiffs. Such an understanding would require an interpretation of Section 218(2) that gives rise to wholesale liability at the instance of all persons who sustained loss or damage as a result of the contravention. That is to place a burden of liability and hence risk upon directors so great that it is hard to imagine who would accept office on these terms. And if that is what the legislature intended it would be expected to have made the imposition of so great a burden clear. The better interpretation is that the legislature intended that the specific requirements of any liability are to be found in the substantive provisions of the Companies Act.”

24. I align myself with the remarks made in the Steinhoff case that S218(2) simply recognizes that liability for loss or damage may arise from contraventions of the Companies Act but what that right is and who enjoys it is to be found in the provisions of the 2008 Act itself. One cannot read into the provisions of the 2008 Act something which is not stated. To do so, will lead to absurd, onerous and untenable consequences.

25. In the present matter, save for alleging in paragraph 21 of their Particulars of Claim, that “the second plaintiff found that the information provided by the second defendant in respect of performance of the business was significantly overstated” and in paragraph 22 alleging “the only reasonable inference that can be drawn from this is that the second defendant intentionally or negligently misrepresented the performance of the business in order to make it more attractive to the second plaintiff than it was, thus inducing him to enter into the sale

agreement on behalf of the first plaintiff”, the plaintiffs have has not alleged any reasons why the second defendant should be held liable for any damage suffered by the plaintiffs. A bland, bald allegation will not pass muster and attract personal liability of a director in my view. The fear of obtaining an “empty” judgment against the first defendant as submitted by Mr Mullins for the plaintiff will also not justify the citation of the second and third defendants in the absence of proper allegations against them.

26. The plaintiffs have further not made any allegations regarding the conduct (whether by way of act or omission) of the third defendant to warrant him as director being held personally liable to the plaintiffs.

27. I am therefore of the view that the second and third defendants have been misjoined in the action and that the plaintiffs have failed to make out any case to hold them liable in their personal capacities.

28. In the result, I make the following order:-

28.1. The first Special Plea of misjoinder is upheld;

28.2. The plaintiffs are directed to pay the costs of the second and third defendants jointly and severally, the one paying the other to be absolved.

SINGH AJ

Date of hearing: 6 February 2023
Date of Judgment: 17 February 2023

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