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IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO PROVINCIAL DIVISION, POLOKWANE)

CASE NO: 5772/2016

1/9/2017

**REPORTABLE
OF INTEREST TO OTHER JUDGES
REVISED**

In the matter between:

CHEMFIT FINE CHEMICALS (PTY) LTD
trading as SA PREMIX

APPLICANT

and

MOKHUTAMANE KENNETH MAAKE
(Identity number: [...])

FIRST RESPONDENT

RAMAREDI MARTHA MPHAHLELE

SECOND RESPONDENT

(Identity number: [...])

MICHAEL JOHN NUNES

THIRD RESPONDENT

(Identity number: [...])

KLEINBOOI MUZIWEMPI TWALA

FOURTH RESPONDENT

(Identity number: [...])

CHRISTIAAN JACOBUS ALBERTUS KIRSTEIN

FIFTH RESPONDENT

(Identity number: [...])

JUDGMENT

M.G PHATUDI J

[1]. A. INTRODUCTION:

1.1. In these proceedings, the Applicant initially sought relief against the First to the Fifth Respondents (“the respondents”) in the following terms:-

- (a) An Order declaring the Respondents delinquent directors pursuant to the provisions of Section 162(5)(c)(iv)(bb) of the Companies Act¹ (“the Act”) and,

¹ Act 71 of 2008, as amended.

(b) That, the Respondents be personally held responsible for the debts

owing by a certain business entity described as Mike's Chicken (Proprietary) Limited (under Supervision) ("Mike's Chicken") to the Applicant pursuant to the provisions of Section 424(1) of the old Companies Act 61 of 1973, as amended,

1.2. In its Practice Note dated and served on 10 April 2017, the Applicant's counsel emphatically abandoned prayers 1.1 and 1.2 of the notice of motion referred to in (a) and (b), above. In consequence, the Applicant only persists in claiming alternative relief couched in prayers 1.3 to 1.5 of its notice of motion, which in essence, forms the nucleus of this application.

1.3. The alternative claim, which is now the heartbeat of the Applicant's claim, seeks relief mainly that the Respondents be ordered to pay to the Applicant, damages pursuant to the provisions of Section 218(2) of the Act, in the amount of R3 126 334-41 jointly and severally, the one paying, the others absolved, interest at the rate of 10.25% per annum ***a tempore morae*** to date of final payment, and costs of suit on a punitive scale.

1.4. The Application is opposed on a variety of grounds including certain points ***in limine***, which I shall consider in detail herein.

1.5. The provisions of Section 218(2) of the Act read as follows:-

Section 218(2):

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

1.6. I shall revert to the language employed in subsection 2 of Section 218 and its interpretation later in my judgment.

B. FACTUAL MATRIX:

- [2]. The Applicant is a business entity that conducts trading as, inter alia, a supplier of medicated and nutritional feed additives. The Respondents are alleged to be individual directors of a certain business entity known as Mike's Chicken, also registered as a trading company under the company laws of the land.
(Registration number: 1982/006172/07). This company according to its profile data ("IPC") was incorporated on 29 June 1982. Mike's Chicken is involved in poultry Farming Operation in Plot 129 Doornbuilt, Polokwane, Limpopo Province.
- [3]. Mike's Chicken, on 04 July 2016, was placed under business rescue under the supervision of Messrs Pieter Hendrik Strydom and Thomas George Nell.
- [4]. Mike's Chicken, which as I have already shown, is an autonomous business legal entity, with its own separateness, applied for credit facilities from the Applicant on 09 MAY 2014, the credit limit thereof being an amount of R1.5 million payable thirty (30) days after the date of invoice or statement. The material terms and conditions thereof are contained in Annexure "FA⁵" to the founding affidavit ("FA").

- [5]. From the face of this document, (credit application form) it appears that Messrs. Michael John Nunes and Christiaan Jacobus Albertus Kirsten, the latter having resigned on 29 March 2016, were then the shareholders or members of Mike's Chicken and also the parties who themselves applied on its behalf for the credit facilities.

I add to state, though orbiter that the present directors were, by the time the credit facility was applied for also already the directors of Mike's Chicken.

- [6]. Mike's Chicken again on 12 November 2014 sought an increase of their credit facility to R4 million on the usual terms and conditions as the previous credit facility. Its indebtedness then escalated to an amount of R3 126 334-41 as reflected in Annexure "FA7", being a computer spread-sheet of the capital debt due owing and payable by Mike's Chicken.

From October 2015 and despite compliance with its contractual obligations, the Applicant experienced difficulties with Mike's Chicken for its inability to honour payments of the rendered invoices. As matters stood, Mike's Chicken was and as October 2015 trading under insolvent circumstances in that it was allegedly unable to settle its debts as and when they became due and payable.

- [7]. The reality of the status of its illiquidity became even more apparent when on 27 March 2016, in a compromise letter to the Applicant, Mike's Chicken offered to settle

the capital debt due by it on R50 000-00 weekly installments effective from 04 April 2016, the objective being to wipe out the debt by the end of May 2016.

[8]. Against the foregoing backdrop, it is common cause that Mike's Chicken has been placed under supervision on 04 July 2016. On 18 July 2016 at the first meeting of creditors in the business rescue proceedings, Mr Nell, one of the appointed business rescue practitioners, addressed the creditors with regard to the contents of a letter dated 04 July 2016 (Annexure "FA⁹") written by the Third Respondent. The contents of Annexure "FA⁹" referred to, project a picture that Mike's Chicken's trading solvency has been compromised due to an ever increasing debt accumulation. From this document, it appears that Mike's Chicken has been in a financial distress since 2014.

[9]. The foregoing observation stems from the resolution of the board of directors of Mike's Chicken dated 30 June 2016 in support of a call to have it placed under Voluntary Business Rescue as defined in Section 129 of the Act. (Annexure "FA⁴")². That was when Messrs. Strydom and Nell were appointed as its Business Rescue Practitioners ("practitioners"). It was contended by the Applicant that it was never advised by Mike's Chicken of its "financial distress" as it was obliged to disclose in clause 13 of its credit facility application.

² Consolidated Paginated pages 42-43, "FA".

- [10]. The Applicant contended further that had it known of Mike's Chicken's "financial distress" prior to its extension of application for a credit facility, it would not have granted its extension in the circumstances.
- [11]. The Applicant further submitted that in the premises it has incurred damages in the amount of R3 126 334-41 claimed in the notice of motion, being the amount said to be owing, due and payable by Mike's Chicken.
- [12]. It is the foregoing contention that triggered opposition by the Respondents of this claim. The Respondent's bone of contention primarily rests on two pillars, First, and raised as a ***point in limine***, was that of a non-joinder of both Mike's Chicken (Pty) Ltd, and its appointed Business Rescue Practitioner/s. Second, is the late filing of applicant's Replying Affidavit and non-condonation.
- [13]. The crisp issue therefore is whether the technical preliminary legal point of non-joinder raised in the present application is fatal to the proceedings, and thus leads to dismissal thereof.
- [14]. The importance of the non-joinder of Mike's Chicken in the present application as contended for by the Respondents allegedly finds force or application within the ambit of the provisions of Section 141(2)(c)(ii) of the 2008 Companies' Act which provides that:-

Section 141(2)(c):

(1).....

(2) “ If at anytime during business rescue proceedings, the practitioner concludes that-

(c) “ there is evidence, in the dealings of the company before the business rescue proceedings began, of “-

(ii) “ reckless trading, fraud or other contravention of any law relating to the company, the practitioner must-

(aa) “ forward the evidence to the appropriate authority for further investigation and possible prosecution...”

[15]. A closer scrutiny of the provisions, which mainly govern investigations of affairs of a company, seems to me that it merely enjoins the business rescue practitioner to “forward the evidence” if any of alleged reckless trading, fraud or other contravention of any law for further investigation and possible prosecution.

[16]. The obligations as set out in Section 141(2) of the Act take root once a business rescue practitioner has been appointed to assume full management control of the company in substitution for its board of directors and pre-existing management. Should he/she in the course of the performance of his/her duties and the powers set apart in the Act, find any evidence in the dealings of the company prior to the business rescue proceedings commenced, in the manner contemplated in Section 141(2)(c)(ii) (aa), all what is required to do is to refer such evidence of impropriety to the relevant authorities for further investigation and where appropriate, for prosecution.

- [17]. These statutory powers as conferred by Section 140 on the practitioner, raises the question whether a business rescue practitioner (“BRP”) render him/her a necessary party with direct and substantial interest in the pending litigation involving the directors/ shareholders of the company vis-à-vis third party creditors. The answers to this question should in my view be in the negative. The BRP other than the statutory obligations referred to, does not acquire corresponding legal interest in the outcome of a *lis* between the directors and the company’s creditors. There is in this instance no relief sought against either Mike’s Chicken or the BRP appointed for it.
- [18]. On 30 June 2016, the directors of Mike’s Chicken resolved to commence business rescue proceedings as contemplated in Section 129 of the Act. Pursuant thereto, on 04 July 2016, a written notice to “all affected persons” was issued, notifying them of the placement of the company under supervision occasioned by business rescue proceedings.
- [19]. The legal consequences and effect of such business rescue proceedings having been initiated, in essence placed a general moratorium on legal proceedings against Mike’s Chicken, regard being had to the stipulations in Section 133(1) of the Act which provides that:-

Section 133(1):

“ During business rescue proceedings, no legal proceedings, including enforcement action, against the company, or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum except ...

(a).....

(b) “with the leave of court and in accordance with any terms the court considers suitable”...

(c).....

(d).....

(e).....

[20]. With the legal bar in the form of the moratorium introduced by Section 133(1)(a) – (e), it follows that it would have been ludicrous if not absurd for the Applicants to have joined Mike’s Chicken in the application, as the business rescue application was already in existence prior to the launching of the application. To do so would have been to engage in a costly and protracted legal exercise, seeking, for instance, the written consent of the BRP, leave of court, set-off if necessary, and related exceptions so as to cite the company as a co-respondent in the proceedings.

[21]. The crisp issue for inquiry in this application really is whether the Respondents “contravene” any provision/s of the Act and if so, is he/she liable to any other person for any loss or damage suffered by the aggrieved party for the infringement. This is what to my mind personal liability of the company directors is all about.

It is this alleged “contravention” that one must consider whether is it Mike’s Chicken as a separate juristic person or the natural *personae iuris* which are organs of control and management of the company that are civilly liable to the Applicant.

The answer in my view, should be in the positive, that, it is the latter who should incur personal liability. This is particularly so that Section 133(1)(a)-(e) contrains the Applicants to proceed against Mike’s chicken (under supervision) as a joined party in the matter.

In consequence, I find that because there is no *lis* between the Applicant and Mike’s chicken which, in any event there is no evidence of reckless trading or fraud perpetrated by it, and further that no relief is thus sought against it,³ the issue of non-joinder falls away.

[22]. The next consideration in order to impute the alleged “contravention” of any provision against the Respondents, is the nature of the contravention within the ambit of Section 218(2) of the Act.

[23]. The new Companies Act (Act 71 of 2008) introduced a few statutory prohibitions and otherwise offensive conduct by either the Company or its constituent members or directors. A classic example are the provisions of Section 22(1) (a) and (b) which provides that:-

Section 22(1):-

“ A company must not-

³ Gordon v Department of Health, KZN 2008(6) SA 522[SCA] PARA [9] & [11].

(a) carry on its business recklessly, with gross negligence, with intent to defraud any person or for any fraudulent purpose, or

(b) trade under insolvent circumstances”

[24] On a semblance of the facts in this application and taking into account the trading history by the company (Mike’s chicken “under supervision”) it follows that the directors on its behalf or its agents, have since approximately May 2014 been trading under “insolvent circumstances”. That, notwithstanding, the directors on or about 12 November 2014, despite being in financial distress, went on to seek to increase its already strained liquidity by borrowing against their credit facility an amount of R4 million, which swelled their indebtedness to the Applicant.

In doing so, needless to say, the company did so through its directors who in dealing with a third party (Applicant) did so as its agents, for a company cannot act on its own unassisted by its agents.

[25]. It is contraventions of these or other nature that invariably attracts personal liability of the directors within the meaning and purport of Section 218(2) and ancillary provisions.

[26]. It was submitted on behalf of the Respondents that the Applicants failed to prove that it has suffered any damage for purposes of Section 218(2). This view is based on the submission that damage can only mean any amount not recovered from Mike’s chicken after termination of the Business Rescue, and that this could purely be a matter of conjecture. Although this submission may at face value sound valid, I

am of the view that for present purposes it is misguided, for the reasons that will follow.

[27]. Clearly, the Respondents as directors of Mike's chicken, are indebted to the Applicant in the amount claimed in the application and as per credit facility which is due and payable as a principal capital debt. It was not Mike's chicken, a juristic person autonomous in its legal status, that contravene the provisions of the Act by trading in "insolvent circumstances" projected by the Applicant, but squarely its directors.

C. GENERAL LEGAL PROVISIONS CREATING LIABILITY

[28]. I have already intimated [para: 23] that the new Companies Act introduced a few measures imputing general or personal liability of either the company *per se* or its directors. I propose to refer briefly to each relevant provision to illustrate the point and deal with the legal implications thereof.

28.1. Section 22(1) prohibits a company to carry out its business recklessly, with gross negligence, with intent to defraud any person or for fraudulent purpose. A company is also forbidden to trade under insolvent circumstances.⁴

⁴ The full provisions of Section 22(1)(a) and (b) are cited in para: 23 of judgment.

28.2. In addition, Section 77 creates liability of the director/s relevant to the common law principles relating to breach of fiduciary duties. The liability is for any loss, damage or costs sustained by the company. In this regard the liability of the directors arises in the event of an infringement of the common law principles founded in a breach of fiduciary obligations as a result of which the company(the victim) incurs “any loss, damages or costs” (own emphasis). In this context Section 77 (2) and 77 (3) provides :-

Section 77(2):

“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 a company as a consequence of any breach by the director of a duty contemplated in Section 75, 76(2) or 76(3)(a) or (b)” Section 77(b) which is similar to Section 77(a), however, creates liability based on delict.

Section 77(3):

A director of a company is liable for any loss, damages or costs sustained by the company as a direct or indirect consequence of the director having:-

- (a).....

(b) acquiesced in the carrying on of the company's business despite knowing that it was being conducted in a manner prohibited by Section 22(1)."

28.3. In it, Section 77(1) to 77(10) broadly viewed, imposes far reaching liabilities for "contravention" of the Act on the directors of a company, who clearly act on its behalf as its functionaries or organs of the company. Section 77(3)(a) in addition, strictly speaking, places liability on a director/s who acted in the name of the company, signed anything on behalf of the company or purported to bind the company, despite knowing that the director lacked authority to do so. Here the rules of agency find application.

28.4. Section 214(1)-214(3) also imposes liability on a "party" (which includes a director) for falsification of any accounting records, reckless and non-compliance. Of cardinal importance are the provisions of Section 214(1)(c) which states:-

Section 214 (1)(c):

"A person is guilty of an offence if the person –

(c). "was knowingly a party to –

(i). "conduct prohibited by Section 22(1)"..... These provisions are in my opinion wide enough to impose liability to any party, including a director of a

company, who “contravenes” any provision of the Act. In this instance conduct prohibited by Section 22(1), without derogating the provisions of other prohibitions within the four corners of the Act, covers “trading under insolvent circumstances” which gives rise to either personal liability and/or criminal sanctions regard being had to the general provisions of Section 214 of the Act.

28.5. Furthermore, Regulation 123(5) of the regulations promulgated under the Act (Regulations of 2011) provides:

“ A company whose board is required in terms of Section 129(7) to deliver a notice to affected persons advising that it has not resolved to commence business rescue proceedings, must either –

(a). deliver a notice in Form CoR 123.3 to each affected person in accordance with regulation 7, or

(b). inform each affected person of the availability of a copy of the Notice, in the manner contemplated in Section 6(11)(b) (ii) and regulation 6”. The notice referred to in the regulation is one of a decision by the direction not to begin Business Rescue.

It follows that failure to issue the notice in the manner stated and the directors, contrary to the required notice, voluntarily places itself under business rescue and supervision as the Respondents did on 04 July 2016,

this conduct if I am correct, clearly offends against the provisions not only of Section 214(c) (i), but also in particular, regulations under the Act.

[29]. Intrinsically connected to these offences, is the general civil liability created by the Provisions of Section 218(2) which imposes liability once, again, to “any person” who “contravenes” any provisions of the Act. The nature of liability is one for “any loss or damage” suffered by the aggrieved party arising from the contravention.⁵

[30]. Properly interpreted, the civil liability made available under Section 218(2) brings about liability *sui generis* against “any person” encompassing the directors, shareholders and any creditor to file a suit against any person who “contravenes” any provision of the Act for any loss or damage incurred on account of the contravention . The word “contravene/s” though not defined, and when used juridically, implies violation or conduct repugnant to any provision under the Act and the regulations made thereunder. Similarly, it may even attract liability for any conduct that omits by commission or non-compliance with a provision of the Act or the regulation. Such liability ensues as a result of any contravention, and therefore such ordinary common law requirements for liability as fault or wrongfulness are dispensed with.

[31]. As to whether in matters like this there has been sufficiency of causality, **Nugent JA** stated as follows in **Minister of Safety and Security v Van Duivenboden**⁶

⁵ The full provisions of Section 218(2) are cited in Para: 1.5, supra.

“A Plaintiff is not required to establish the causal link with certainty, but only to establish that the **wrongful conduct was probably a cause of the loss**, which calls for a sensible retrospective analysis of what would probably have occurred, based upon the evidence and what can be expected to occur in the ordinary course of human affairs rather than an exercise in metaphysics” (own emphasis).

[32]. Given the afore stated passage, it cannot reasonably be expected of the applicant or a plaintiff to formulate a specific contravention and in turn causally link it meticulously with exactitude the “loss or damage” actually suffered. It would be sufficient in my view, if the applicant could establish that a “loss or damage” has been sustained “ **as a result of that contravention**” contemplated in Section 218(2).

[33]. To put cushion of Section 218(2), Section 218(3) goes on to provide:-

Section 218(3):

“The provisions of this section do not affect the right to any remedy that a person may otherwise have. (own underlining)

Any remedy would, to my mind, include a claim in torts for civil damages if established by the evidence and on a balance of probabilities.

⁶ 2002(6) SA 431 (SCA) at 449 E-F.

[34]. In general to found personal liability of a director it is necessary that “any contravention” of the provisions of the Act must have been present.

[35]. I find refuge also from the dictum of **Du Plessis AJ in Rabinowitz v Van Graan and Others**⁷ at Paragraph 21 where the Learned Acting Judge stated:-

“..... Bearing in mind that the Act specifically contemplates that the business and affairs of a company are to be managed by or under the direction of its board, (Section 66(1)) it is hard to conceive of any basis upon which the legislature intended to prevent a company from acting in the manner provided for in section 22, but did not intend to prevent the directors responsible for the management of the company from acting in that manner. The court went on to state in paragraph 22 that:

“I agree with these submissions and find that a third party can hold a director personally liable in terms of the Act for acquiescing in or knowing about conduct that falls within the ambit of section 22 thereof.”

I fully subscribe to the sentiment echoed by the Learned Acting Judge in this regard.

[36]. A further view I take, considerable reliance being based on instructive authority is that even if the Applicant did not specifically plead in its founding affidavit its claim on other provisions except Section 218(2) to found liability for alleged loss or damage incurred as a result of contravention of any provision of the Act, it is

⁷ 2013(5) SA 315 at 320 G – I.

apparent on a holistic reading of its papers, that sufficient facts that show contravention of sections 22, 77(3)(b), 214 and 218(2) of the Act were alleged and established that constituted contravention of any of those provisions.

Any conduct that contravenes a provision of the Act, catapults any person, including the directors to personal liability.

- [37]. The foregoing proposition finds support from the extract of the judgment of **O' Regan J in Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs**⁸, where the Learned Judge remarked:-

“ Where a litigant relies on a statutory provision, it is not necessary to specify it, but it must be clear from the facts alleged by the litigant that the section is relevant and operative.”

- [38]. That said, the applicant having relied on section 218(2) as an alternative claim in its Notice of Motion, (Prayer 1.3) I am of the firm view that its claim ought to succeed since section 218(2) should be seen as a general enabling remedy.

- [39]. In addition to the above stated principles as laid down by apex courts, the court in the judgment of **Blue Farm Ltd v Rapitrade 6 (Pty) Ltd and Others**⁹, Mantame J held at Paragraph 31 that:

⁸ 2004(4) SA 490 (CC) at 507 C-D. See also Fundtrust (Pty) Ltd (in Liquidation) v Van Deventer 1997(1) SA 710(A).

⁹ Case no: 22288/2014, (WCD) delivered on 01.04.2016, Marked “Reportable”.

“In my opinion, the approach to be adopted when interpreting this section is narrow approach because of the ambiguity of the section. This court can only interpret this section to mean that directors of a company are liable for loss, damages or costs sustained by the company as a direct or indirect consequence of the director having acquiesced in the carrying on of the company’s business despite knowing that such conduct is prohibited by section 22(1)...for instance, if the director is liable for the loss, damages or costs sustained by the company – who would ordinarily enforce the civil claim against the directors, as that is not provided for the in Act. This approach would create a lacuna.”

I align myself with the principle outlined by the court, for to interpret the section too widely, and adopt a wider meaning, would lead to a manifest absurdity which would not have been intended by the lawgiver.

D. CONDONATION

- [40]. Lastly, but not least, there remains the application sought for condonation for late filing of Applicant’s replying affidavit. It is generally trite that the court enjoy a judicial discretion whether to grant condonation for non-compliance with any uniform rule of court, provided good cause is shown, regard being had to the degree of lateness, the reasons for the delay, the reasonableness of non-compliance, the importance of the real issues in dispute, and above all, whether there are reasonable prospects of

success on the matter under consideration, which is the high watermark for the court to exercise its discretion properly.

See: Melane v Santam Insurance 1962(4) SA 531 (A), and Madinda v Minister of Safety and Security 2008(4) SA 312 (SCA).

Having read the applicants' replying affidavit and the issues contained therein, I am of the opinion that the interests of justice require that condonation be granted. The primary consideration is that the main issues between the parties really reside within the parameters of the founding and answering affidavits. The rest are peripheral, not causing any prejudice to the respondents, either. The condonation is therefore granted.

E. COSTS

[41]. Having said that, a word on costs. It is trite that the award of costs, which again is discretionary on the court hearing the dispute, usually in civil proceedings rests primarily upon the object of squaring up a party for costs to which that party was wrongly put. That underpins the basic premise that a successful party should be awarded its costs, if the other party in opposition contest the claim, thereby placing itself is a perilous collision course. There is, however, no case made out for the punitive costs sought against the Respondents.

[42]. In the result, I make the following order:-

- (a) The application succeeds.

- (b) The First to Fifth Respondents, jointly and severally, the one paying the others to be absolved, are ordered to pay the Applicant damages pursuant to the provisions of **Section 218(2) of Act 71 of 2008 (Companies Act, 71 of 2008)**, in the amount of **R3 126 334-41**.

- (c) Interest thereon at the rate of **10.25% per annum** *a temporae morae* to date of find payment.

- (d) Party and party costs are awarded to the Applicants including the costs for employment of Counsel.

M G PHATUDI
JUDGE OF THE HIGH COURT
LIMPOPO DIVISION, POLOKWANE

Representations:

- | | | |
|---------------------------------------|----------|-----------------------------|
| 1. Counsel for the Applicant | : | Adv. J Van Rooyen |
| Instructed by | : | Donn Bruwer |
| | | c/o DDKK Attorneys |
| | | Polokwane |
| 2. Counsel for the Respondents | : | Adv. G. Diamond |
| Instructed by | : | Kirk Twine Attorneys |
| | | Polokwane |
| 3. Date heard | : | 07 June 2017 |
| 4. Date delivered | : | 01September 2017 |