IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION: BLOEMFONTEIN

Case No.: 3635/2013

In the matter between:-

O A NOORDMAN N.O.	1st Plaintiff
S M RAMPOPORO N.O.	2nd Plaintiff

and

J F B DE BRUIN	Defendant

CORAM:	DAFFUE, J
JUDGMENT BY:	DAFFUE, J
HEARD ON:	2, 3 and 5 JUNE 2015
DELIVERED ON:	29 JANUARY 2016

I INTRODUCTION

[1] The liquidators of an insolvent company and the sole shareholder and former director of that company are at loggerheads. The manner in which the insolvent company carried on its business is the centre of attraction in so far as the liquidators believe that its former director should be held liable in his personal capacity for the insolvent company's debts.

II THE PARTIES

[2] Messrs O A Noordman and S M Rampoporo, the two liquidators of Elysium Graanbemarking (Pty) Ltd (2000/006848/07) (in liquidation), (herein later referred to as "the insolvent company"), are the plaintiffs. Adv P Zietsman SC appeared for them before me.

[3] Mr Jopie Fourie Beyers De Bruin, the sole shareholder and former director of the insolvent company, is the defendant. He was represented by Adv J D Maritz SC.

III THE RELIEF SOUGHT

[4] Plaintiffs seek an order in terms whereof defendant is declared personally liable for payment of the total debts of the insolvent company in the amount of R2 952 836.37 plus interest *a tempore morae* and costs. The claim is based on s 424 of the Companies Act, 61 of 1973 ("the Old Companies Act"), which deals with the liability of directors and others for reckless and/or fraudulent conduct in respect of a company's business. In terms of this section a court may, on application of *inter alia* the liquidator of a company, declare that any person who was knowingly a party to the carrying on of the business of the company, recklessly, or with intent to defraud creditors of the company or creditors of any other person, or for any fraudulent purpose, 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.

[5] In their particulars of claim plaintiffs rely on sixteen grounds in support of the averment that defendant shall be personally held liable. I do not intend to quote those grounds now, but shall deal with the more pertinent grounds which were raised in the evidence.

IV UNDISPUTED MATERIAL FACTS

[6] The following are undisputed:

6.1 Feedex Exchange (Pty) Ltd ("Feedex") trades as a grain merchant, conducting its business *inter alia* in the Free State Province.

6.2 Feedex has been doing business with an entity known as Elysium Graanbemarking ("Elysium") since about 2002. Defendant was Elysium's contact person and for all intents and purposes effectively in control of Elysium.

6.3 Elysium, or the insolvent company as contended by defendant, also acted as grain merchant and particularly in the Koppies district, Free State Province. Defendant was at relevant times a farmer and grain producer who conducted his business in the Koppies district.

6.4 *Ex facie* documentary evidence placed before me, and following the trend of previous years, several contracts were entered into between Feedex and Elysium during 2005 in respect of the 2005/2006 sunflower harvest season. In terms hereof Feedex purchased grain from Elysium in respect of sunflower crops still to be planted by various farmers ("producers").

6.5 When entering into the various contracts Feedex knew at all relevant times that Elysium had entered into back to back agreements with producers in the Koppies district in order to be able to sell and deliver grain to Feedex. In each case the parties recorded that the grain sold by Elysium to Feedex had been purchased from a particular producer. Defendant as representative of Elysium signed the contracts as producer ("produsent"), which is clearly not correct as Elysium acted as grain merchant.

6.6 The identities of all producers in respect of all contracts entered into between Feedex and Elysium were therefore known to Feedex and duly recorded in writing.

6.7 The business of a grain merchant (and farming in general) is risky as many risk factors such as droughts, hail, excessive rainfall and several other factors have an impact on production of grain.

6.8 Already in January 2006 defendant informed Mr Botha of Feedex that two of the farmers with whom Elysium had contracted, did not plant any sunflower and that it would not be possible for Elysium to honour its contractual obligations in respect of these two contracts as and when they become due. The one producer, Loggenberg, failed to plant any sunflower due to financial difficulties. He sold 400 tons of sunflower to Elysium who in turn sold this quantity of grain to Feedex. The second producer, a Mr van der Westhuizen, died and also failed to plant any sunflower before his death. He sold 250 tons of sunflower to Elysium who in turn sold the same quantity to Feedex.

6.9 At the beginning of June 2006 Feedex owed Elysium R278 906.00 in respect of grain delivered which it failed to pay. Feedex was strictly speaking entitled to withhold payment, bearing in mind the contractual terms agreed upon, but it is evident that Feedex, in order to stay competitive in the market, orally agreed to pay its sellers for deliveries on a weekly basis and not as stipulated in its written contracts.

6.10 Over and above the 650 tons referred to above, Elysium was contractually bound to deliver a further 910 tons of sunflower to Feedex which it failed to do notwithstanding an undertaking to deliver at least a further five freights during the week of 7 June 2006.

6.11 Elysium also entered into back to back contracts with defendant personally and his son in his personal capacity as producers and although they had grain available for purposes of delivery, they failed to deliver their grain to Feedex through Elysium or at all.

6.12 It is clear from the minutes held by the Koppies magistrate in respect of the two meetings chaired by him that no creditors, not even Feedex, proved claims against the estate of the insolvent company. This was in essence conceded by Mr Senekal who claimed that claims could still be proven.

V DISPUTED FACTS:

[7] Defendant disputed that he had conducted the affairs of the insolvent company in any fraudulent or reckless manner as set out in s 424(1). By far the majority of the facts averred in paragraph 6 of the particulars of claim were disputed in defendant's plea and remained in dispute. I will deal with only those issues raised during the trial when the evidence is evaluated.

VI THE EVIDENCE:

[8] The plaintiffs called two witnesses, to wit Mr Ben Botha, a director of Feedex and Mr Kobus Senekal, attorney and director of Matsepes Inc, whereafter they closed their case. Defendant closed his case without leading any evidence.

[9] Numerous documents contained in four bundles were placed before me. The parties agreed that I should not consider any document not specifically referred to and identified during evidence or during the interrogations which took place before the Magistrate of Koppies in terms of ss 414 & 415 of the Old Companies Act. They also agreed beforehand that the documents were what they purported to be, save that the correctness thereof was not admitted, unless specifically so confirmed or not put in issue during the trial. I need to emphasise at this stage that the transcript of the interrogations was not accepted by defendant to be correct in all respects.

Nothing really turns on this as it is evident from a reading of the record that questions and answers were not properly recorded in several instances, probably due to either mechanical problems, or somebody not speaking in the microphone or people speaking simultaneously.

[10] Mr Botha was plaintiffs' first witness. His company, Feedex, obtained judgment by default against the insolvent company in case number 2531/2006. In that matter the insolvent company was the plaintiff and Feedex the defendant. The insolvent company's claim in the amount of R278 906.00 was dismissed and judgment by default was granted in respect of Feedex' counterclaim in the amount of R1 538 429.54 plus interest. Cost orders were also made in favour of Feedex. The insolvent company's attorneys withdrew just before the trial and consequently there was no appearance on its behalf. It should be mentioned that Feedex admitted the amount claimed by the insolvent company, but pleaded that payment was not due until the insolvent company delivered all grain it agreed to deliver in terms of the various written contracts. As mentioned this is not in line with the evidence tendered by Mr Botha eventually during this trial.

[11] The illiquid counterclaim was based on damages suffered as a result of the insolvent company's breach of contract. Nowhere in these pleadings was it alleged that Feedex had not contracted with a company, contrary to the evidence of Mr Botha. As mentioned judgment was eventually granted for payment in the amount of R1 538 429.54 plus interest. When action was instituted herein the total of the claim, interest included, amounted to R2 952 836.37 and

this is the amount claimed by plaintiffs from defendant. Plaintiffs calculated their claim by merely adding interest to the Feedex claim for which default judgment was granted earlier.

[12] During his testimony Mr Botha denied that defendant acted on behalf of a company known as Elysium Graanbemarking (Pty) Ltd when the relevant contracts were entered into. As far as he was concerned defendant merely traded under the name and style of Elysium Graanbemarking. He placed much reliance on a contract entered into on 6 March 2002 which reflects defendant's identity number and no reference to a company or company number. It is also evident that all contracts entered into during 2005 reflect the name Elysium Graanbemarking without reference to it being a company and no company number was provided. Unlike the earlier contract referred to, defendant's identity number is not contained in these latter contracts. We were told that the contracts provided to defendant for completion were in respect of individuals as the Feedex contracts with legal entities contained suretyship clauses. I'll deal with Mr Botha's knowledge of the corporate entity later. He could not explain why the pleadings were drawn on the basis that the insolvent company was indeed the party that contracted with Feedex and thus responsible for the damages suffered.

[13] There can be no doubt that defendant was at all relevant times the person acting on behalf of Elysium. Feedex and Elysium were grain merchants as mentioned above and were conducting the same type of business. As was the case with Elysium, Feedex also entered directly into contracts with producers in terms whereof grain still to

be planted was purchased for delivery after harvesting has taken place.

[14] It appeared from Mr Botha's evidence that Feedex, and he in particular, was fully aware of the manner in which Elysium went about its business. The witness used to provide a standard Feedex contract to defendant who then made copies thereof. The contract price for a particular season was predetermined by Mr Botha. Elysium would then source grain from producers, particularly in the Koppies area and defendant would then fill out the Feedex contract in his own handwriting, *inter alia* indicating the tons to be sold and delivered, the purchase price, the date of delivery and the farm (of the particular producer) where delivery would take place. Although it did not happen in every instance, the name of the particular producer with whom Elysium had contracted on a back to back basis, was written at the top right hand corner of the first page of the contract. Feedex needed this for their own administrative purposes. It also recorded full details of each and every producer with whom Elysium had back to back contracts for the delivery of grain as well as his contractual obligations.

[15] Printouts of the details of all transactions, indicating in each case the original producer's name, the tons to be delivered, the price to be paid and the date of delivery were affixed to all contracts entered into between Feedex and Elysium.

[16] Feedex negotiated contracts with its purchasers for on-selling of grain based on *inter alia* the contracts entered into with Elysium. Bearing in mind droughts, excessive rainfall, hail, other natural disasters or

unfortunate events, it would always be possible for Feedex as agent or middleman to negotate with its purchasers to alleviate its contractual obligations. The agent can, according to Mr Botha, buy grain from a different producer if one of its producers is not capable of complying with his contractual obligations, even if the agent has to pay more than it initially agreed to pay the initial producer. The agent can also ask its purchaser for posponement of delivery, and if need be, even until the next harvesting season. Such agent can also entrench himself against the risk eventuating in order to minimise his damages. The witness was not allowed to expand on this topic as Mr Maritz objected on the basis that he would be required to give an opinion, whilst no notice of expert evidence and/or an expert's summary had been filed. The objection was sustained.

[17] In January 2006 defendant and a producer, Mr Loggenberg, made an appointment with Mr Botha who was then informed that Loggenberg, with whom Elysium had contracted to the knowledge of Feedex, never planted any sunflower as he could not get financial assistance. By then the planting season was not over yet. It was put to the witness in cross-examination that he listened to the two gentlemen, but did not offer any assistance and reiterated that Feedex would be seeking from Elysium compliance with its contractual obligations. Mr Botha testified that it was expected of defendant to buy grain from other producers to make up any deficit as had been done in the past. It was also put to the witness that he had been informed that a further producer, a Mr van der Westhuizen with whom Elysium had a contract as well, passed away earlier and that that contract would also not be honoured; also that a Mr

Oosthuizen, another producer, had problems as well. Mr Botha confirmed the news about Mr Van der Westhuizen, but stated that Mr Oosthuisen's problems were not raised at that stage. Loggerenberg's grain had to be delivered not later than 15 June 2006.

[18] In February 2006 defendant delivered 180 tons less than agreed upon. Feedex initially indicated that it would buy in grain from other producers and hold defendant liable for damages. However the witness stated that the short delivery of grain in February 2006 was made up by late deliveries as agreed with Feedex' purchasers. There were no serious delivery problems in March and April 2006. In May 2006 serious problems arose. Elysium was in breach of contract and failed to deliver. This caused Mr Botha to write a letter to defendant dated 17 May 2006 indicating that the outstanding deliveries amounted to 1560 tons. A discussion between the two gentlemen followed and on 26 May 2006 Mr Botha received a fax indicating defendant's problems. The letterhead of the document bears the name Elysium Graanbemarking (Pty) Ltd with its registration number. According to Mr Botha that was the first time that he became aware of the existance of such a company. In this fax defendant mentioned the 650 tons of the producers Loggenberg and Van der Westhuizen due for delivery in May and June referred to earlier and confirmed that these would not be delivered. He also indicated that it would not be possible to harvest sunflower at that stage as it was still wet. Mr Botha referred in his evidence to several further letters written by him between 30 May 2006 and 12 June 2006, the contents of which were read into the record. As mentioned, it is evident that Mr Botha was well aware as early as

January 2006 of the fact that Elysium would not be able to deliver the 650 tons of Loggenberg and van der Westhuizen.

[19] Feedex undertook not to withhold payment due on 9 June 2006 in respect of grain deliveries received on condition that Elysium deliver at least five freights of grain during the week of 7 June 2006. However Elysium failed to honour the agreement reached with Mr Botha. Eventually it was placed on record in a letter of 8 June 2006 that the amount of R278 906.00 would be paid into the trust account of Feedex' attorneys with instructions to pay the amount against delivery of the last 612 tons of sunflower (excluding the aforesaid 650 tons). It was also suggested that Elysium cede its claim to Feedex in respect of the 650 tons referred to *supra*. No response was received.

[20] Notwithstanding the negotiations and attempts by Mr Botha to ensure that Elysium complies with at least some of its contractual obligations, matters turned sour to such an extent that in a letter dated 12 June 2006 Mr Botha accused defendant of theft and threatened to institute criminal charges against him. Co-incidently on that very same day the simple summons of the insolvent company, Elysium Graanbemarking (Pty) Ltd was signed by its Bloemfontein attorney whereafter the summons was issued for payment of R278 906.00.

[21] Mr Senekal's evidence did not take the matter any further. He merely referred to the interrogations conducted by himself of several witnesses, including defendant and also confirmed the correctness of the transcript of proceedings. Feedex' claim was never proved at

anyone of the two meetings of creditors. I find this strange and disturbing. If this is the case, it would mean that if the plaintiffs' claim is dismissed with costs, defendant as the applicant in the winding-up application of the insolvent company would eventually be held responsible for the costs incurred by the plaintiffs. This does not appear to be just. Mr Senekal indicated that it would still be open for Feedex to prove its claim with leave of the Master or the court, but there would surely be no reason for it to do so if the plaintiffs' claim is dismissed.

[22] Defendant closed his case without leading any evidence.

VII CERTAIN LEGAL PRINCIPLES:

[23] As mentioned, the plaintiffs' claim is based on s 424 of the Old Companies Act which still applies as chapter 14 of that Act has not been repealed. Section 424(1) 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 <u>recklessly</u> or <u>with intent to defraud creditors</u> of the company or creditors of any other person or <u>for any fraudulent purpose</u>, 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." (emphasis added)

[24] It is important to emphasize the words "recklessly", "with intent to defraud creditors" and "for any fraudulent purpose". Fraud, or at the very least recklessness, must be proved. Normal breach of contract or negligence would not suffice. See: **Ebrahim & Another v Airport Cold Storage (Pty) Ltd** 2008 (6) SA 585 SCA para 15:

> "… (T)he function of the statutory provision also shapes its application. … The section retracts the fundamental attribute of corporate personality, namely separate legal existence, with its corollary of autonomous and independent liability for debts, when the level of mismanagement of the corporation's affairs exceeds the merely inept or incompetent and becomes heedlessly gross or dishonest. …….those running the corporation may not use its formal identity to incur obligations recklessly, grossly negligently or fraudulently. If they do, they run the risk being made personally liable". (emphasis added)

[25] In **Philotex (Pty) Ltd v Snyman**; **Braitex (Pty) Ltd v Snyman** 1998 (2) SA 138 SCA at 142 (H – I) the Supreme Court of Appeal held that it is not necessary to prove a causal link between the relevant conduct and the debts or liabilities for which a declaration of personal liability is sought in terms of s 424. However in **Saincic & Others v Industro-Clean (Pty) Ltd & Another** 2009 (1) SA 538 SCA at para [20] Farlam JA stated that the absence of a causal link is a factor to be taken into account when the court exercises its discretion whether or not to grant the declaration. In a separate judgment Harms JA confirmed this at para [30]. It is clear from a reading of s 424 (1) that the court has a general discretion to hold a person personally responsible for all or any of the debts or other liabilities of the company. The word "may" is used and not "shall" which latter word is generally associated with a peremptive

provision.

[26] Recklessness, as the term is understood in legal parlance is a totally different concept than negligence, although it might be seen as "growwe nalatigheid" or "gross negligence". See: **<u>Fourie v Newton</u>** 2010 JDR 1437 SCA at para [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."

Put otherwise, as in **<u>Philotex</u>** loc cit at 144A,

"…., 'recklessly' does not connote mere negligence but at the very least gross negligence and nothing in s 424 warrants the word's being given any other than its ordinary meaning."

Howie JA (as he then was) proceeded at 144B of the judgment as follows: "In the application of the recklessness test to the evidence before it a Court should have regard, *inter alia,* 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 any, of recovery:…."

[27] In Meskin, <u>Henochberg on the Companies Act</u>, vol 1 at 916 (2) the author makes the following submission:

> "It is submitted that, based on the above dicta in the Philotex case and the Fourie case, *supra*, mere non-compliance with a duty, in the absence of grounds for suspicion (Fisheries Development Corporation

> *supra* at 165) may properly be regarded as negligent rather than reckless conduct (eg, books of the company not being written up and the director failing to determine the true facts (Howard v Herrigel NO 1991 (2) (SA) 660 (A) at 678)), but, if there are clear suspicious circumstances in respect of a company's transactions, the director has a duty to act and a failure to so, or mere reliance on information given by a third party, must be reckless conduct according to the test postulated in the Van As case *supra* (but cf the Triptomania Twee case *supra* at 374, where failure by a highly qualified director to investigate clear inconsistencies in the financial statements in respect of tax payments was determent to be negligent and not reckless."

[28] The aspects "with the intent to defraud" or "for a fraudulent purpose" ordinarily play a role where the company is carrying on its business and incurs debts at a time when to the knowledge of the directors there is no reasonable prospect of the creditors ever receiving payment. See Henochsberg *loc cit* at 916 (2). One single reckless or fraudulent transaction is sufficient to bring the conduct within the ambit of s 424(1).

VIII <u>EVALUATION OF THE EVIDENCE</u>

[29] It is clear from the evidence that Feedex was at all relevant times fully aware of the identity of the producers with whom Elysium concluded back to back contracts. There was no recklessness or intention to defraud or fraudulent purpose in the manner in which defendant conducted its business. The attitude and actions of defendant since January, but particularly during May and June 2006 were criticized by Mr Zietsman and these should be considered more closely. It must be pointed out that plaintiffs failed to rely in

their particulars of claim on such conduct, in particular the failure to deliver grain, as a ground for liability in terms of s 424(1).

[30] Defendant indicated at an early stage to Mr Botha that it would not be able to comply with its contractual obligations pertaining to the Loggenberg en Van der Westhuizen contracts as these two producers failed to plant any crop. It is clear from the evidence that the price of sunflower went up in the meantime and that if sunflower had to be purchased from other producers, the purchaser would have paid more than the original price agreed upon. Feedex was in a position to negotiate with its purchaser(s), as Mr Botha testified, for delivery to take place at a later stage and even at the end of the next season. I am mindful of the fact that successful negotiations might have come at a price. It is however evident from Mr Botha's evidence and the letters referred to by him in evidence that he took a strong and even obstinate stance against defendant, insisting on contractual compliance and withholding of monies that were due and payable. On 30 May 2006 Mr Botha warned as follows: "Ons het genoeg moeilikheid met kort-lewering, om nog moeilikheid te kry met laat-lewering. Onthou dat laat-lewering se gevolge vir alle praktiese doeleindes, dieselfde is as nie-lewering. Dit kan selfs erger wees, aangesien daar 'n prys penalisasie is." The alternative offers were made at a stage when defendant had already indicated that Elysium *"bang is Feedex hou geld terug van boere wat onskuldig is."* This was recorded by Mr Botha in his letter of 7 June 2006.

[31] By the end of May Feedex failed to pay defendant for grain delivered and it is apparent that defendant was dissatisfied with the situation. This was contrary to the practice that had been developed

notwithstanding the terms and conditions of the written contracts. The question to be considered is whether defendant's failure to make further deliveries in such circumstances, especially in so far as Feedex insisted that payment would only be made when Elysium complied with all its contractual obligations fully, could be found to be reckless or fraudulent conduct. It must have been clear to defendant at that stage that it was objectively impossible to comply with all its contractual obligations and therefore, even if the R278 906.00 was to be paid on receipt of the five extra freights as offered by Mr Botha and confirmed in his letter of 7 June 2006, chances were that Feedex might withhold payment in respect of these further deliveries, causing defendant to be out of pocket and unable to pay its producers. *Ex facie* the transcript of the insolvency interrogation defendant personally borrowed money to settle claims of producers in order to prevent them from suffering losses due to Feedex' attitude.

[32] Although defendant may be blamed for not delivering the five extra freights of sunflower as allegedly agreed upon in order to receive payment of the R278 906.00, the failure to deliver these freights cannot be regarded as reckless or fraudulent conduct by the director of the insolvent company. There was no undertaking by Feedex to also pay for the five freights of sunflower upon delivery and based on its attitude to hold money back, the reasonable supplier might have been under the impression that Feedex would not pay for these five freights until there was full compliance by Elysium in respect of all its contractual obligations. Defendant's fear was real. The letter of 7 June 2006, the last paragraph in particular, confirms this. The parties knew, as was the case several months earlier in

that defendant played open cards with Mr Botha, it would not be possible to deliver fully in respect of all contracts. At that stage defendant was already instructing attorneys as the simple summons was issued as soon as 12 June 2006. Mr Zietsman's submission that defendant misled Feedex when he undertook to deliver five freights while at that stage instructing attorneys to sue Feedex and that such conduct was fraudulent in the circumstances is without substance, bearing in mind my comments *supra.* In any event, this was not relied upon as a ground for liability in terms of s 424(1).

[33] Mr Zietsman also submitted that defendant's fraudulent action is evident from the fact that he elected to issue summons (on behalf of his company) against the producers Oosthuizen and Loggenberg, but that no action was taken against others who failed to deliver, including himself and his son. Defendant was thereafter the driving force of the litigation between his company and Feedex over a period of years, only to surrender eventually and thereafter to apply for his company's winding-up.

[34] As mentioned plaintiffs rely in their particulars of claim on sixteen grounds for the relief claimed. Few of these have been touched upon in evidence and/or in argument by counsel. Apparently some of the grounds have been formulated based on defendant's evidence during the insolvency interrogations before the Koppies magistrate. Mr Botha testified that he was unaware of the existence of the defendant's company until May 2006. Therefore plaintiffs rely on s 50 of the Old Companies Act which provided for personal liability in certain instances. The action was not based on the provisions of this section, but reliance was placed on non-

compliance thereof as one of the grounds for liability under s 424(1). Defendant is also blamed for entering into contracts on behalf of his company with *inter alia* Feedex and Tiger Brands without ensuring that the back-to-back contracts with its producers would yield sufficient produce to comply with its contractual obligations. Fact is that for several years the parties contracted on the same basis without any problems. Also, clearly identified producers' crops were sold to Feedex with reference to their names and the particular farms where crops would be planted.

[35] It is also averred that defendant should have arranged for entrenchment ("verskansing") to enable his company to still comply with its contractual obligations in the event of a failure by its producers to produce in terms of their obligations. Bearing in mind Mr Botha's own evidence that it was always possible to renegotiate delivery dates and/or to buy in grain from other producers, and an awareness of the risks, this ground is on its own inadequate to find in plaintiffs' favour. Mr Zietsman did not argue the issue, as in the case of the inadequate back-to-back contracts, at all.

[36] I do not accept that the litigation instituted can be labelled as fruitless and that defendant acted fraudulently. His company had a liquid claim while Feedex' claim for damages was illiquid. The mere fact that legal costs have been incurred is a necessary consequence of litigation. It appears from defendant's interrogation that his company carried on with business during at least 2007. An amount of in excess of R1.5M was received during this year from Tiger Brands in respect of maize contracts which were entered into on the same basis as in casu. However various producers, including

defendant personally, had to be paid and expenses settled if the cheques relied upon by plaintiffs are considered. The investigation was not continued and it is uncertain what was due to the company. Mr Zietsman did not labour this issue at all during argument. The receipt of payments by either defendant or his company's attorney has been dealt with in the plea and no evidence pointing to action within the ambit of s 424(1) has been led. It was alleged that payments had been made from the insolvent company's cheque account towards university expenses of defendant's daughter, but it has not been proven when these payments were made and that defendant was not entitled at the time to authorise these. This aspect was also not argued on behalf of plaintiffs. The further allegations that defendant used his company as a conduit and that he failed to differentiate between the legal *persona* of his company and himself have not been addressed in evidence or arguments. It is apparent from the contracts entered into that Feedex should have been well aware that defendant and his son entered into contracts under their own names, distinct from the name Elysium Graanbemarking. These allegations are without merit. The same applies to those not specifically mentioned herein.

[37] In my view defendant did not act recklessly, fraudulently or with the intention to defraud creditors, and Feedex in particular, although there can be no doubt that his company failed to comply with its contractual obligations. The plaintiffs failed to bring their claim within the ambit of s 424 (1) of the Old Companies Act and therefore the action should be dismissed.

[38] Even in the event of a finding that defendant acted recklessly to an

extent, I still have a discretion whether or not to issue a declaratory order in accordance with the aforesaid subsection. Bearing in mind the conduct of Feedex and Mr Botha in particular, and there obvious intention from the onset that Elysium would be held to its contractual obligations, come what may, until the very last moment when it was prepared to advance a possible solution, the manner in which defendant dealt with the matter is such that he should in my view not be held personally liable for the debts of the insolvent company. Feedex, and Mr Zietsman in his argument before me, maintained that Feedex was within their rights to withhold payment notwithstanding the evidence presented by Mr Botha referred to above. Contrary to the wording of its written contracts, it paid producers on delivery in the past. Defendant had reason to believe that if he, his son and other producers were to deliver grain in circumstances where it was impossible for Elysium to comply fully with its contractual obligations, Feedex might have refused to pay. In the process blameless "*onskuldige*" producers might be prejudiced.

[39] The plaintiffs having been unsuccessful, there is no reason why the claim should not be dismissed with costs.

IX THE REQUEST FOR FURTHER PARTICULARS AND COSTS

[40] In conclusion I also need to deal with the costs of the plaintiffs' application in accordance with rule 21(4) of the Uniform Rules of Court and the wasted costs in respect of the postponement of the trial in November 2014. Mr Maritz submitted that the plaintiffs should pay these costs *de bonis propriis*. Mr Zietsman argued that

the wasted costs in respect of the postponement of the trial should be costs in the cause and defendant be ordered to pay the costs of the application in accordance with my discretion as set out in rule 21(5).

[41] The plaintiffs insisted that defendant be directed to supply better further particulars to their request for further particulars for purposes of trial dated 17 October 2014. The application, filed on 21 April 2015, was opposed and was set down for hearing on 28 May 2015, a mere three court dates before the first day of the hearing of the main action. I quote *verbatim* from the notice of motion which is in Afrikaans:

> "1. Dat die Respondent verplig word om 'n <u>verbeterde antwoord</u> op die Applikant se Versoek om Nadere Besonderhede gedateer 17 Oktober 2014 onder saaknommer 3635/2013 en meer spesifiek paragrawe 1, 3, 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 17, 18, 19, 20, 21, 22, 23, 24, en 25 en wel binne 'n tydperk soos bepaal deur die Agbare Verhoorregter af te lewer;
>
> 2. Indien die Respondent versuim om aan hierdie bevel te voldoen dat:
>
> 2.1 Verlof aan die Applikante (Eiser) om die hof te nader om op dieselfde stukke of soos aangevul vir die skrapping van die Verweerder se verweer, en vonnis tesame met koste teen die Verweerder soos uiteengesit in die Besonderhede van Vordering.
>
> 3. Dat die Respondent gelas word om die koste van hierdie aansoek te betaal;
>
> 4. Sodanige verdere en/of alternatiewe regshulp aan die Applikante te verleen as wat die Agbare Hof mag behaag;" (emphasis added.)

[42] In order to appreciate that dispute it is necessary to provide a history of the litigation in chronological order:

1 The plaintiffs issued summons on 10 September 2013.

2 Defendant's plea was filed on 25 October 2013.

3 On 24 January 2014 plaintiffs filed their notice of set down, trial dates having been allocated, to wit 25, 26 and 28 November 2014.

4 On 26 March 2014 a pre-trial conference in terms of rule 37(8) was held before Kruger J, who *inter alia* ordered defendant to make discovery by not later than 30 May 2014. The parties were also directed to file their requests for further particulars for purposes of trial by not later than 31 July 2014 and to furnish the further particulars requested in terms of the rules. The parties were also directed to hold a pre-trial conference by 25 August 2014 and to file the minutes thereof by 5 September 2014. At that stage the matter was not certified trial-ready.

5 The rule 37 minutes were filed on 3 July 2014.

6 On 17 October 2014, nearly a year after the close of pleadings, the plaintiffs filed a rule 37 questionnaire and requested further particulars for purposes of trial. The request for further particulars was filed contrary to Kruger J's directions.

7 Defendant responded to plaintiffs' request and filed his answers on 5 November 2014.

8 Three separate applications to compel were filed by plaintiffs on 7 November 2014 in respect of the alleged failure to file a discovery affidavit, the failure to supply better further particulars and the failure to respond to the rule 37 questionnaire. One application would suffice. The applications were set down for hearing in the unopposed motion court and on 13 November 2014 Lekale J granted certain orders. Defendant was compelled to file better further particulars for purposes of trial and to file its discovery affidavit. The application to compel better further particulars was fatally defective in that the date of set down was reflected as 6 November 2014 instead of 13 November, while the other application was totally unnecessary and ill-founded as defendant had served his discover affidavit months before the application to compel was brought. The orders were abandoned eventually.

9 On 20 November 2014 plaintiffs brought a further application to compel better further particulars which was set down for hearing on 25 November 2014, but not proceeded with. On 25 November 2014 the main action and the application in terms of rule 21(4) were removed from the roll by agreement. On that same day plaintiffs' attorney enrolled the matter again for hearing on 2, 3 and 5 June 2015, the dates having been agreed upon by the parties and allocated by the Registrar. This was done, well-knowing that the better further particulars the plaintiffs required were outstanding.

10 On 21 April 2015, five months after a similar application was removed from the roll, plaintiffs launched the present

application in terms of rule 21(4), still seeking the same better further particulars as in the past, which application was opposed as mentioned *infra*. This application was enrolled for hearing on 28 May 2015, a mere three court days prior to the first trial date of the main action. Heads of argument were filed, but on the day of the hearing the parties settled the matter, save for the issue of costs.

[43] After the close of pleadings any party may deliver a notice requesting <u>only</u> such further particulars as <u>are strictly necessary</u> to enable him/her to prepare for trial. Such a request shall be complied with within ten days of receipt thereof. See rule 21(2) of the High Court rules. Although rule 21(2) stipulates that a party may request his/her further particulars by a notice delivered not less than twenty days before trial, our High Courts, and this division in particular, have approached the matter differently in recent times following the need to have a proper case flow management system in place. Therefore, as a general rule, the case flow management judge shall not certify a defended civil action as trial-ready unless further particulars have been requested and supplied, to mention just one aspect relating to pre-trial procedure. I accept that there was uncertainty amongst practitioners as to the exact ambit of the practice in this division notwithstanding the introduction of a case flow management procedure by Erasmus AJP (as he then was) in the beginning of 2014. Therefore it shall not be held against the parties and plaintiffs in particular that no certificate has been issued indicating that the main action was trial-ready. Fact of the matter is that on 28 May 2015 the case was not ready for trial as the parties were still at loggerheads as to whether or not better further

particulars ought to be supplied.

[44] Rule 21(5) stipulates that the trial court shall at the conclusion of the trial *mero motu* consider whether the further particulars requested by a party were strictly necessary and shall at that stage disallow all costs of and flowing from any unnecessary request or reply, or both, and may order either party to pay the costs thereby wasted on an attorney and client basis or otherwise. Rule 21(2) is clear: a party is only entitled to particulars that are strictly necessary to enable him/her to prepare for trial. A party is particularly not entitled to further particulars for trial relating to a bare denial. See **Swart v De Beer** 1989 (3) SA 622 (ECD) at 625D and further, and the numerous authorities relied upon. In **Hardy v Hardy** 1961 (1) SA 643 (WLD) at 646D-F, a judgment by Munnik AJ (as he then was) relied upon in **Swart v De Beer**, the following remarks were made:

> "From a perusal of the numerous authorities quoted from the Bar by both counsel for the plaintiff and counsel for the defendant, it appears that in each case where particulars were sought and granted, they were particulars of allegations made in the pleadings by the party from whom such particulars were sought. No case was quoted to me in which a party, who had pleaded a bare denial of the allegations made by his opponent, was ordered to give particulars of any matter placed in issue by such a denial. That this is so, is not surprising, as this would be tantamount to ordering a party to furnish particulars of allegations made by his opponent, and it cannot be the function of particulars to enable a party to prove allegations which he himself has made." (emphasis added.)

[45] Where the denial necessarily involves an implied and affirmative allegation, the position is different for in such a case the mere fact

that the allegation is not stated in so many words, the court will not be precluded from ordering further particulars. **Hardy v Hardy** *loc cit* at 646H – 647A.

[46] It should therefore be abundantly clear that a litigant confronted by his opponent's denials is not entitled to admissions or to a better answer as that already provided in response to a request for further particular for purposes of trial. A party is also not entitled to further particulars which are irrelevant and do not relate to the pleaded issues. In similar vein a party may not in a request for further particulars raise further or new issues. See **De Polo and Another v Dreyer and Others** 1991 (2) SA 164 (WLD) at 174I – J.

[47] It is trite that the applicant in application proceedings must make out his/her case in the founding affidavit. A litigant should not be allowed to try and make out a case in the replying affidavit. The founding affidavit must contain sufficient facts in itself upon which a court may find in the applicant's favour. An applicant must stand or fall by his/her founding affidavit. See **Director of Hospital Services v Mistry** 1979 (1) SA 626 (AD) at 635H – 636D.

[48] Fresh allegations cannot be made in the replying affidavit. Allegations in an applicant's replying affidavit which should have appeared in the founding affidavit or which are irrelevant and would gravely prejudice a respondent may be struck out and/or disregarded. It is not sufficient to prepare a skeleton of a case in the founding affidavit and then to add flesh in the replying affidavit. See **Titty's Bar and Bottle Store (Pty) Ltd v ABC Garage and Others** 1974 (4) SA 362 (TPD) at 369A and further. *In casu,* I have

to consider costs after having considered the evidence led at the trial and further submissions made, but I cannot close my eyes for the history of the matter and allegations made in the application papers.

[49] Mr Zietsman and Mr Senekal, a senior attorney of Matsepes Inc, have been acting on behalf of plaintiffs from the onset and they were also responsible for drafting the particulars of claim. The plaintiffs made detailed averments and *inter alia* pleaded material facts – and even evidence - in sixteen sub-paragraphs under paragraph six of the particulars of claim in order to arrive at the conclusion that the business of the insolvent company was carried on recklessly or with the intention to defraud creditors thereof and that defendant shall be personally held liable for the insolvent company's debts.

[50] It is trite that legal representatives drafting pleadings on behalf of litigants shall make averments only if a factual basis has been laid for the averments to be made. They may not suck facts out of their proverbial thumbs.

[51] Mr Senekal personally conducted interrogations in terms of s 415 of the Old Companies Act on behalf of the plaintiffs and thoroughly interrogated defendant on two occasions. Other persons were also interrogated, including two people specifically mentioned in the particulars of claim. The plaintiffs were presented with financial records of the insolvent company and contracts entered into between Elysium Graanbemarking and Feedex. They also obtained

pleadings in the litigation between the insolvent company and Feedex at a stage. I have reason to believe that the facts (and evidence) relied upon to draft the particulars of claim were obtained from the interrogations and information and documentation received before, during and/or following such interrogations. Plaintiffs should have been well placed to proceed with the trial.

[52] Plaintiffs had to prove their case and could not call upon defendant to provide particulars which would merely assist them in preparing for trial the case they had to prove, particularly where defendant had put all issues in dispute.

[53] The application was not proceeded with as the parties came to an agreement that defendant would supply some of the particulars sought. It is however necessary to deal with the application in order to arrive at an appropriate costs order. Mr Senekal deposed to both the founding and replying affidavit *in casu*. He particularly should have been in a position to inform the court as to why the particulars sought were strictly necessary to enable plaintiffs to prepare for trial. He made the bold assertion in paragraph [18] of the founding affidavit that detailed legal submissions would be made to the court at the hearing of the application and equally boldly submitted in paragraph [19] that the responses received from defendant in reply to the request for further particulars for purposes of trial caused plaintiffs serious prejudice as they were prevented from preparing for trial. These are legal conclusions which the court had to adjudicate eventually, but unfortunately no facts were recorded in support of plaintiffs' case as to why the further particulars were sought, that these were strictly necessary and on what basis

plaintiffs would be prejudiced if these were not provided.

[54] I would not be prepared to consider the replying affidavit if the application was to be adjudicated on the merits; alternatively, if I did and allowed the averments in the replying affidavit to stand, I would have allowed defendant a further opportunity to deal with those aspects.

[55] Plaintiffs must blame themselves for the predicament, if it can be described as such, in which they found them. The pleadings were closed in November 2013 and Kruger J directed the parties to file requests for further particulars for purposes of trial by not later than 31 July 2014. Notwithstanding these two events, plaintiffs waited until 17 October 2014 to file their request. Defendant complied timeously, but not with plaintiffs' satisfaction. This caused the abortive applications referred to above and eventually the removal of the action and application in terms of rule 21(4) from the roll on 25 November 2014. Plaintiffs immediately set down the matter for hearing on 2, 3 and 5 June 2015 and instead of launching a proper application to compel compliance in terms of rule 21 immediately, they waited a further five months. I cannot see that any order that I might have made in favour of plaintiffs at that late stage of the proceedings could have alleviated plaintiffs' burden to prepare for the hearing that was enrolled to proceed the following week.

[56] Mr Zietsman submitted in his heads of arguments in the application proceedings that plaintiffs had to rely upon the evidence of outside sources and the evidence of defendant as the insolvent company's former sole director. I disagree with this submission. Surely,

plaintiffs would have to rely on the evidence of third parties and documentary evidence obtained**,** but it is not for defendant to prove plaintiffs' claim and/or to make the required admissions where he had already denied the applicable averments. Mr Zietsman also submitted that the finding in **Swart v De Beer** *loc cit* was questionable and secondly, that the case is distinguishable. I could not find any annotations to the judgment and was not referred to any authorities questioning the court's findings. I accept that this judgment, which followed a long line of cases, has not been criticised or overruled notwithstanding being delivered a quarter of a century ago. I respectfully agree with the court's reasoning and conclusion. The mere fact that the court did not specifically refer to rule 18(5) is immaterial. That rule stipulates that if a party denies an allegation of fact in the previous pleading of his/her opponent, he/she shall not do so evasively, but answer the point of substance. There is nothing more to be stated if one denies an averment to say so. Although the cause of action in **Swart v De Beer** was different from that *in casu,* the legal principle reiterated in that judgment is clear and the case should not be distinguished. The judgment in **Schmidt Plant Hire (Pty) Ltd v Pedrelli** 1990 (1) SA 398 (D & CLD) on which Mr Zietsman relied is clearly distinguishable. The claim in reconvention was for damages alleged to have been suffered as a result of the collapse of a dam wall which the plaintiff had built for the defendant. The request for further particulars for trial was reasonable and the information was strictly necessary to enable plaintiff to prepare for trial. The court's *dicta* at pp 402I – 403A that it was entitled in an enquiry such as it was confronted with to go beyond the pleadings was well-founded. There, particulars were sought relating directly to the counterclaim, *i.e.* whether the dam wall had been repaired and by whom, what were the costs involved and had any efforts been made to repair the dam wall, and if so, by whom and at what costs. Here, plaintiffs are seeking mainly admissions and/or defendant's interpretation of documents, bearing in mind that the onus to prove defendant's liability is on plaintiffs and defendant does not have to assist them.

[57] I agree with most of the allegations contained in defendant's answering affidavit and the submissions made by his counsel. I do not intend dealing in detail with the individual requests for further particulars, save as stated later in this paragraph. I believe that my general observations suffice to a large extent. It is not necessary for defendant to make any admissions in order to assist plaintiffs to prepare for trial or to prove their case against him. In so far as defendant elected to deny the version pleaded by plaintiffs, he could not be called upon to admit one, more, or all of the allegations plaintiffs wanted him to admit. I shall limit my discussion to some issues, but it should not be understood that I disregarded those not mentioned. Defendant denied the alleged unlawful conduct as set out in detail in the particulars of claim, save for a few admissions. The aim with questions 6, 11, 14, 19, 21 and 23 was to extract admissions in the face of defendant's earlier denials. Plaintiffs were not entitled to any better responses as those advanced. Questions 7, 20, 22 and 24 were premised on admissions being made which were not made. These are therefore irrelevant. There might have been a case made out for defendant to respond to questions 5, 9 and 10, but as mentioned, applicant failed to do so. Questions 3, 8, and 12 relate to interpretation and it is really irrelevant for purposes of preparing for trial. Question 1 is irrelevant as plaintiffs rely on a

specific transgression of s 50 of the Old Companies Act, which has been denied, and they are not entitled to unfair interrogation. The other questions have been abandoned.

[58] Plaintiffs were in a much better position than any normal civil litigant in so far as they were armed with the transcript of the interrogations held under s 415 of the Old Companies Act and had been provided with the financial records and other financial information of the insolvent company, not in terms of normal discovery at a late stage of the proceedings, but long ago and when the interrogations took place. Furthermore they have all along been in possession of all relevant contracts entered into by the insolvent company, referred to only as Elysium Graanbemarking, with Feedex. It is also important to remember that plaintiffs had every opportunity to consult with all potential witnesses, probably even before summons was issued herein. There can't be any prejudice to plaintiffs. They could and should have summoned all potential witnesses and in some cases witnesses could have been summoned *duces tecum*. They should have been ready for trial, and if not, it was of their own making and defendant should not be blamed. If they were not ready, the only deductions to be made are that they either did not do their homework and prepare for trial properly, or that they were on an unsuccessful fishing expedition which is hard to believe in so far as the particulars of claim were drawn by experienced and respected legal representatives who surely would not have acted on speculation, but facts.

[59] Mr Maritz wanted Mr Senekal to admit in cross-examination that plaintiffs were aware of all the answers they requested in their

request for further particulars. I stopped Mr Maritz from cross-examination in this regard as the aim had nothing to do with the merits of the claim, but to extract evidence to show that plaintiffs acted grossly unreasonable. Mr Senekal testified that the request was drawn up in collaboration with senior counsel, Mr Zietsman, and that they believed it to be reasonable. He *inter alia* indicated that plaintiffs wanted to know whether defendant admitted that the insolvent company entered into contracts with Feedex and that these were for delivery of grain. Plaintiffs were in possession of several contracts between Elysium and Feedex and it was apparent that these were for grain delivery. Defendant testified during the insolvency interrogation that he acted on behalf of his company when the contracts were entered into. We know that the contracts do not refer to the abbreviation "(Pty) Ltd" or company number, but we also know that Mr Botha testified on behalf of plaintiffs that no contracts were concluded with Elysium Graanbemarking (Pty) Ltd, the company, although his testimony is not supported by Feedex' allegations contained in the pleadings referred to *supra* which led to judgment by default being granted against the company. The present action was brought for the ultimate benefit of Feedex, a creditor whose claim against the insolvent company was never proved. This is inexplicable.

[60] Therefore I conclude in saying that there was no basis on which the application could succeed and I would have dismissed it with costs. It is so that in terms of an agreement entered into defendant provided some of the particulars required. Even in so far as I might have found that plaintiffs were strictly speaking entitled to some better further particulars, I would have exercised my discretion

against them. The pleadings have been closed eighteen months earlier and the parties were at the door steps of the trial court for a second time. Again, as was the case in November 2014, plaintiffs decided to wait until the eleventh hour to launch exactly the same interlocutory application as before. Such approach cannot be countenanced. There is much criticism to be levelled at the manner in which plaintiffs elected to litigate. They acted grossly unreasonable in requiring irrelevant particulars and/or particulars to which they were not entitled to prepare for trial, but their blatant disregard for the directions issued by Kruger J and the approach to wait until the eleventh hour on two occasions to launch their interlocutory applications must be penalised. The information the plaintiffs required in respect of contracts and the parties involved thereto could easily be obtained from Feedex who is really the driving force behind the plaintiffs' case. Other information required was either irrelevant or so obvious that the application could really be regarded as frivolous. If the usual costs order is made, defendant as petitioning creditor in the winding-up application will have to bear such costs as no claims have been proved. Even if claims are proved at a later stage which is highly unlikely, there is no reason why such creditors shall be saddled with payment of such costs. Plaintiffs should never have instructed their attorneys to launch the two applications in the manner they did and in so doing acted unreasonably and improper. They should be ordered to pay the costs of the application issued on 21 April 2015 *de bonis propriis* notwithstanding the general rule. See: **Cooper N.O. v First National Bank of SA Ltd 2001 (3) SA 705 (SCA) at para 37; Ex parte Klopper N.O.: in re Sogervim SA (Pty) Ltd (in liquidation), (Sogervim SA intervening)** 1971 (3) SA 791 (TPD) at 797G and

<u>Grobbelaar v Grobbelaar</u> 1959 (4) SA 719 (AD) at 725B. The same order should be made in respect of the wasted costs pertaining to the postponement of the hearing set down for 25, 26 and 28 November 2014.

X ORDER

[61] I therefore make the following orders:

1. Plaintiffs' action is dismissed with costs.

2. Plaintiffs are directed to pay the costs of the rule 21 application dated 21 April 2015, including the wasted costs occasioned by the postponement of the hearing set down for 25, 26 & 28 November 2014 *de bonis propriis*.

3. The legal costs incurred by plaintiffs in prayer 2 *supra* shall not form part of the administration costs in the liquidation of Elysium Graanbemarking (Pty) Ltd.

J.P. DAFFUE, J

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