REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA) 7/8/15

CASE NO: 88615/2014

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

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

(3) REVISED.

07-AUGUST-2015

DATE SIGNATURE

In the matter between:

DRILLCON (PTY) LTD Plaintiff

and

GRAHAM KEVIN SODEN Defendant

DATE OF HEARING : **27 JULY 2015**

DATE OF DECISION : **07 AUGUST 2015**

J U D G M E N T

MANAMELA AJ:

[1] This matter came before me by way of a summary judgment application on Monday, 27 July 2015. The application was opposed and at the end of very lively oral submissions by counsel, I reserved judgment. There is an intriguing issue embedded in the arguments. But, I undertook to return quickly with this judgment in order to avoid hamstringing the litigation through delay in delivery of my ruling on the application.

[2] Although the plaintiff is naturally the applicant and the defendant the respondent in this application, I will conveniently retain the references in the action proceedings.

[3] The plaintiff's claim against the defendant is based on a judgment granted by default by this court on 19 December 2011 for payment of amounts of R364 780.80; R1 268 776.40 and interest at 15.5% per annum on the aforesaid amounts and various other amounts, plus costs (the default judgment).[1] However, the defendant only pursues claims based on the aforesaid capital amounts in this matter.

[4] The default judgment was not granted against the defendant, but an entity called Olympic Park Trading 61 (Pty) Ltd (Olympic Park) in a separate litigation between the plaintiff and Olympic Park. It is not necessary to go into the details of the default judgment litigation, save to point out that, the defendant in this matter was not even cited as a party therein.

[1] See annexure "B" to the summons. The default judgment appears to have included interest claims for late payment of invoices, other than the two capital claims in amounts of R364 780.80 and R1 268 776.40. A copy of the summons in respect of the default judgment is included as annexure "A1" to the particulars of claim in this matter.

[5] Olympic Park did not timeously defend the proceedings in the default judgment litigation and default judgment had already been granted against it by the time it filed its notice of intention to defend.[2] Its attorneys were advised in correspondence after they filed the notice that judgment had already been granted against their client.[3] Nothing appears to have become of this correspondence.

[6] However, attempts by the sheriff in March 2012 to execute a writ at the registered office address of Olympic Park were unsuccessful. The sheriff's return on the last of these attempts on15 March 2012 is one of *nulla bona*. It is stated therein that there is a new occupant of the premises at the address.[4]

[7] It is common cause that Olympic Park filed or applied for voluntary liquidation after the default judgment.[5] It was placed under voluntary liquidation on 07 March 2013[6]. The voluntary liquidation is the origin of the current dispute in this matter. The defendant submits that Olympic Park was effectively managed and controlled by the defendant as its sole director or managing director. Therefore, by voluntarily placing Olympic Park in liquidation with knowledge of existence of the judgment in favour of the plaintiff or when such knowledge should have been acquired, the defendant abandoned the business of Olympic Park. This, it is further submitted, constitutes reckless or gross negligence or both, on the part of the defendant, and was done

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2 See para 6 of the particulars of claim on p 6; annexure "C" to the summons on pp 155-156.
3 See annexures "D" and "E" of the particulars of claim on pp 157 – 158.
4 See annexures "F" and "G" of the particulars of claim on pp 162 – 165.
5 See para 11 of the particulars of claim on p 7; para 15 of defendant's affidavit in opposition to the summary judgment application (the opposing affidavit) on p 189.
6 See annexure "G" to the opposing affidavit on p 209. Annexure "G" is letter from the Companies and Intellectual Property Commission (the CIPC) dated 07 March 2013 to the Master of the High Court reporting the voluntary liquidation status of Olympic Park.

with an intention to defraud the plaintiff as a creditor of Olympic Park.[7] Therefore, the plaintiff is entitled to an order as contemplated in section 424(1) of the Companies Act 61 of 1973 (the 1973 Companies Act),[8] read with sections 22, 77, 214 and 218 of the Companies Act 71 of 2008 (the 2008 Companies Act)[9] and judgment summarily on the amounts claimed in the summons. Mr. P.J. Niemann, on behalf of the plaintiff, was to later submit in reply that references to the provisions in the 2008 Companies Act would only become relevant later in the proceedings, should they proceed, and were not relied upon for purposes of the summary judgment application.

[8] So, the instrumental provision for the summary judgment application is section 424(1) of the 1973 Companies Act. It reads as follows:

"(1) When it appears, whether it be in a winding-up, judicial management or otherwise, that any business of the company was or is being carried on recklessly or with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, <u>the Court may, on the application of the Master, the liquidator, the judicial manager, any creditor</u> or member or contributory of the company, <u>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.</u>"

[underlining added for emphasis]

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[7] See paras 11 to 13 of the particulars of claim on pp 7 to 8.

[8] Item 9 of schedule 5 of the Companies Act 71 of 2008 states that Chapter 14 of the 1973 Companies Act will continue to apply to winding up or liquidation of companies, which are essentially insolvent companies until determined otherwise by the legislature.

[9] The Companies Act 71 of 2008 was assented to on 08 April 2009, but its date of commencement was on 01 May 2011, except for a few of its provisions.

[9] The defendant defends the action and opposes the summary judgment. It is submitted on his behalf that, the plaintiff's claim against the defendant is not a liquidated amount in money as contemplated by Rule 32 of the Uniform Rules of this court. Rule 32(1), which is material part of the aforesaid rule, reads as follows:

"(1) Where the defendant has delivered notice of intention to defend, the plaintiff may apply to court for summary judgment on each of such claims in the summons as is only –

(a) on a liquid document;

(b) for a liquidated amount in money;

(c) for delivery of specified movable property;

(d) for ejectment;

together with any claim for interest and costs. "

[10] The defendant raises other issues in his defence like lack of knowledge in respect of the default judgment, due to the fact that the general manager of Olympic Park, who has since passed on, was the one involved in this matter on behalf of Olympic Park. It appears that the late manager would have been the one who instructed the attorneys who filed the notice of intention to defend the proceedings brought against Olympic Park [albeit belatedly so] which led to the default judgment. The defendant states that upon becoming aware of the judgment he consulted with attorneys who advised him on the default judgment. Be that as it may, in my view, what is relevant for current purposes is the defence that the claim is not based on a liquidated amount in money and therefore incapable of sustaining a summary judgment application.[10]

[10] See para 13 of the opposing affidavit on p 189.

[11] Mr Niemann submitted in both his heads of argument[11] and orally when he appeared before this court that, the claimed amount is liquidated by virtue of the default judgment granted against Olympic Park. However, upon a question from the court that such judgment may not necessarily apply to the defendant before a declaration is made by the court that he is liable in terms of section 424, Mr. Niemann submitted that the declaration is permissible even at summary judgment stage. He had submitted in his heads of argument that the plaintiff's claim "is not for a declaratory order but for payment".[12] Mr. De Villiers appearing for the defendant submitted to the contrary.

[12] As already alluded to above, the crisp question to be answered here is whether or not a claim based on section 424 of the 1973 Companies Act is capable of summary judgment. In *Henochsberg on Companies Act 61 of 1973*[13] it is authoritatively stated that the "ambit of this section is wide and, having regard to its object, namely to render liable persons who, in effect, have managed, or are managing, the business of a company recklessly or fraudulently, its language should be given its full breadth".[14] It is further stated in *Henochsberg* that "the declaration may be made in relation to any debt or other liability…"[15] Recently in the yet unreported decision of this court per Bertelsmann J in the matter of *Engelbrecht NO and Others v Zuma and Others,* Case Number: 25965/2012 delivered on 25 June 2015, this is stated:

[11] See para 18 on p 6 of the plaintiff's heads of argument.
[12] See para 21 on p 7 of the plaintiff's heads of argument.
[13] See Kunst JA, Delport P and Vorster Q (editors) *Henochsberg on the Companies Act 61 of 1973* (Lexisnexis online version June 2011 (*Henochsberg*).
[14] See *Henochsberg* on pp 912 to 913 and the authorities quoted there.
[15] See *Henochsberg* on 918(1).

"This is not the end of the applicants' obligation to establish the *quantum* that they may actually be entitled to. It must be born [sic] in mind that they have, for purposes of the present proceedings sought no more than a declaratory order that the respondents are liable to them for such damages that may be proven at a later stage."

[13] Therefore, in my view a declaration by the court is necessary for any liability to ensue in terms of section 424 and it actually precedes any damages claim that may be pursued against the person declared liable. Section 424 does not automatically ascribe liability to a "person who was knowingly a party to the carrying on of the business" "recklessly or with intent to defraud creditors of the company". The aggrieved or interested person, be it the Master, liquidator or creditor, would first have to request the court to declare the particular person liable on grounds that he was knowingly a party to defraud creditors or had carried the business of a company in a reckless manner. Obviously the court seized with the matter would have to conduct a factual inquiry into the factual allegations made and the particular circumstances of the matter. Depending on the probative value of the material on hand, the requested declaration may be made or refused. Assuming a favourable finding is made for the applicant's relief in terms of section 424, the declaration of liability would be for an unlimited amount, but may be "for all or any of the debts or other liabilities of the company as the court may direct". Therefore, with no declaration of liability already made against the defendant, this court does not have the competence to grant summary judgment. It also cannot grant any other order, including a declaration in terms of section 424(1) of the 1973 Companies Act but only what is provided by Rule 32(1) of the Uniform Rules. Without a declaration the

judgment against Olympic Park is not attributable to the defendant and therefore the current claims against the defendant are not liquidated.

[14] A declaration may or may not be made when the plaintiff's claims in this matter are considered by the court in due course, but at this stage of the proceedings such declaration is impossible, no matter whether there is a default judgment obtained against the defendant's liquidated company. This ought to have been foreseeable by the plaintiff and summary judgment was clearly not available, as an option, for the plaintiff. Therefore, the application ought to fail and the defendant is entitled to recover the costs of the application.

[15] I therefore make an order as follows:

(a) The summary judgment application is dismissed with costs on a party and party scale;

(b) The defendant/respondent is granted leave to defend the action.

K. LA. M. MANAMELA

ACTING JUDGE OF THE HIGH COURT