



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

(1) REPORTABLE: YES / ☒ NO

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

(3) REVISED

17 June 2025

DATE

SIGNATURE

CASE NO.: 39063/22

In the matter between:-

AFGRI AGRI SERVICES (PTY) LTD

Excipient

v

MULLER, JOHANNES ZACHARIAS HUMAN N.O.

First Respondent

MADIMI, IMANI N.O.

Second Respondent

POLLOCK, RICHARD KEAY N.O.

Third Respondent

(In their capacity as the duly appointed joint liquidators

Of Grain Marketing (Pty) Ltd (in liquidation))

In re:

In the matter between:-

MULLER, JOHANNES ZACHARIAS HUMAN N.O.

First Plaintiff

MADIMI, IMANI N.O.

Second Plaintiff

POLLOCK, RICHARD KEAY N.O.

Third Plaintiff

v

AFGRI AGRI SERVICES (PTY) LTD

First Defendant

(Registration Number: 1995/005872/07)

ERNST, LUKAS WILLEM BOTHA

Second Defendant

BADENHORST, PETRUS JOHANNES PRETORIUS

Third Defendant

JACOBS, ZELDA

Fourth Defendant

DE VILLIERS, JACOB

Fifth Defendant

PIETERSE, NICOLAAS MARIUS

Sixth Defendant

Heard on: 5 June 2025

Delivered: 17 June 2025 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 16:00 on 17 June 2025

Summary:

1. It is sufficient to plead that the company is in the process of winding up and it is unable to pay its debts.
2. In respect of the winding up of an insolvent company in terms of Section 424 of the Companies Act 61 of 1973, a juristic person can be held liable.
3. In order to sustain a cause of action in terms of Section 424 the fact must be alleged that the first defendant was a party to the carrying of the business or gained knowledge of the fact that the business of the company was carried on recklessly with the intent to defraud creditors or for any fraudulent purpose. It must further be alleged that the first defendant gained such knowledge and participated in the affairs of the company through its directing mind/s.
4. A cause of action should comprise of every fact which would be necessary for the plaintiff prove in order to sustain an action in terms of Section 424.

ORDER

It is ordered:-

1. The first and second grounds of the exception are dismissed.
2. The third ground of the exception is upheld.
3. The costs of these proceedings are costs in the cause.

JUDGMENT

KOOVERJIE J

THE EXCEPTION

- [1] The first defendant excepted to the particulars of claim on the premises that it does not disclose a cause of action. It is the first defendant's case that the allegations contained in the particulars of claim are not sufficient to support the cause of action for the relief claimed in terms of Section 424 of the Companies Act 61 of 1973 ("1973 Act").
- [2] In the main action the plaintiff instituted proceedings against the defendants jointly and severally for an order in terms of Section 424 to declare each of the defendants personally liable for all the debts of Grain Marketing (Pty) Ltd (in liquidation) in the amount of R130,703,611.98. *Alternatively* an order in terms of Section 424 declaring each of the defendants to be personally liable for all the claims of the Copenship entities against the company in an amount of R98,755,669.50.
- [3] Section 424 of the Companies Act of 61 of 1973 stipulates:
- “(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, the court may, on 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 or carrying on of the business in the manner aforesaid, shall be personally responsible, without any limitation of liability, for any of the debts or other liabilities of the company as the court may direct.”¹

- [4] For the purposes of this judgment, the parties will be referred to as they have been cited in the main action proceedings. The Companies Act 61 of 1973 will be referred to as the 1973 Act and the Companies Act 71 of 2008 will be referred to as the 2008 Act. Grain Marketing (Pty) Ltd will be referred to as “the company”. The company is a subsidiary of the first defendant. The first defendant/excipient, Afgri Agri Services (Pty) Ltd, is the shareholder of the said company. The company was placed under a creditors voluntary winding up on 11 May 2020 and is unable to pay its debts within the meaning of Section 339 of the Companies Act of 1973.

- [5] The defendant raised three grounds of exception:

- 5.1 the first ground was that no allegation was made that the company is in **winding up, as not being solvent**, which is a requirement in terms of Section 424 of the 1973 Act;

¹ My emphasis

- 5.2 the second ground was that Section 424 does not create liability for juristic persons but only for natural persons;
- 5.3 the third ground was that the particulars of claim lacked the necessary allegations that the first defendant had, through its directing mind, knowledge of the facts from which a conclusion can be drawn that the business of the company was being carried on recklessly, with the intent to defraud creditors or for any fraudulent purpose. The plaintiff was therefore required to plead facts to substantiate that the directing mind of the first defendant had knowledge; that the first defendant was knowingly a party to the carrying on of the company's business or that the first defendant knowingly participated in the carrying on the company's business.

The first ground of exception

- [6] This ground of exception is premised on the argument that no allegation was made that the **company was in winding up as not being solvent**. It was further contended that the allegation that "the company is unable to pay its debts" within the meaning of Section 339 of the 1973 Act was inappropriate.

- [7] In paragraphs 6.4 and 6.5 of the particulars of claim, the following was pleaded:

"6. The company:

- 6.4 *was placed under creditors' voluntary winding up on 11 May 2020;*
and
6.5 *is unable to pay its debts within the meaning of Section 339 of the Companies Act."*

[8] This dispute was centered on the respective jurisdictional provisions of the two pieces of legislation, namely the 1973 Act and the 2008 Act. It is common cause that Section 424 is part of Chapter 14 of the 1973 Act which has been repealed. Item 9 of Schedule 5 of the 2008 Act regulates the continued application of the 1973 Act in respect of the winding up of insolvent companies.

[9] Simply put, the provisions of the 1973 Act apply to the winding up of insolvent companies particularly Sections 343 to 353 of Chapter 14 whereas Sections 79 to 83 (Part G of Chapter 2 of the 2008 Act) relates to the winding up of solvent companies. The 2008 Act therefore does not contain provisions relating to the winding up of insolvent companies.

[10] It appears that the legislature intends to incorporate the provisions relating to the winding up of insolvent companies in the 2008 Act. For the time being, the provisions of Chapter 14 of the 1973 Act applies in respect of the winding up of insolvent companies.²

[11] The said transitional provision, Section 9, regulates the continued application of the winding up provisions in the 1973 Act stipulates:

“Continued application of previous act of winding up in liquidation:

(1) Despite the repeal of the previous Act, until the date determined in terms of Item (4), chapter 14 of that Act continues to apply with respect

² Standard Bank of SA v R-Bay Logistics 2013(2) SA 293 K2(1) at para 22

to the winding up and liquidation of companies under this Act as if the Act had not been repealed subject to subitems (2) and (3).

(2) Despite subitem (1), Sections 343, 344, 346 and 348 to 353 do not apply to the winding up of a solvent company, except to the extent necessary to give full effect to the provisions of Part G of Chapter 2.

(3) If there is a conflict between the provision of a previous Act that continues to apply in terms of subitem (1) and a provision of Part G of Chapter 2 of this Act with respect to a solvent company, the provision of this Act prevails."

[12] The excipient reasoned that for the plaintiff to rely on the provisions of the 1973 Act, more particularly Section 424, it had to plead that **"the company is in winding up as not being solvent"**. It also had to be pleaded that the company adopted a resolution in terms of Section 351 of the 1973 Act to liquidate the company. By merely alleging that the company is unable to pay its debts within the meaning of Section 339 is of no consequence.

[13] The plaintiffs contended that this ground of objection cannot be sustained. They submitted that a sensible interpretation must be given for the purpose of Section 9 in the 2008 Act. The jurisdictional facts that are pivotal in respect of winding up of insolvent companies in terms of the 1973 Act are that:

- (i) the company is in the process of winding up; and
- (ii) it is unable to pay its debts.

- [14] In support of their proposition, reference was made to the matter of **Standard Bank**³ where the court expressed in order to determine whether a company is insolvent, an applicant would have to establish one of the grounds for winding up as contemplated in Section 345, namely that the company was unable to pay its debts. At paragraph 29, the court reasoned:

"I accordingly conclude that in determining whether a respondent company is or may be 'insolvent' as contemplated in Section 79(3), the court would be entitled to have regard to evidence that the respondent company was unable to pay its debts as contemplated in Section 345 of the Old Companies Act.... In other words, the word insolvent in Section 79(3) is intended to refer to a respondent company which is or may be commercially insolvent.

- [15] Section 344(f) stipulates that a company is unable to pay its debts as described in Section 345. Section 345(1)(c) of the 1973 Act, *inter alia*, stipulates that a company will be deemed to be unable to pay its debts if it is proved to the satisfaction of the court that the company is unable to pay its debts.

- [16] It was illustrated that the relevant facts were pleaded. In paragraph 6.4 it was alleged that the company was placed under a creditors winding up and in paragraph 66, it was pleaded that- this occurred on 11 May 2020 when the special resolution was registered with the Companies and Intellectual Property Commission pursuant to where the company was placed in liquidation via a creditors' voluntary winding up as contemplated in Section 349 and 351 of the

³ Standard Bank of SA v R-Bay Logistics 2013 (2) SA 295 KZD at par 29

Companies Act (paragraph 66).⁴ The winding up in terms of Section 351 could only be invoked if the company is insolvent.

[17] The court in **Boschpoort**⁵ agreed with the reasoning set out in Standard Bank and confirmed:

“... The deeming provisions concerning the inability to pay its debts, contained in Section 345 of the old Act may be used to establish the insolvency of the company.

“21. This conclusion is significant in determining what is meant by a solvent company. The retention by the legislature in the context of a winding up of a solvent company in the new Act of a deeming provisions as to when a company is unable to pay its debts as contained in Section 345 of the old Act, is clear indication of what is meant by an insolvent company in the new Act. It can only mean a company that is commercially insolvent.”⁶

“22. Consequently, an order for a solvent company to be wound up in terms of Sections 80 or 81 of the new Act, it must be commercially solvent. If it is commercially solvent it may be wound up in accordance with Chapter 14 of the Old Act, as is provided in subitem 9(1) of Section 5 of the new Act.”

[18] I am of the view that on a sensible reading of the particulars, the material facts were pleaded, namely that the company was left as an empty shell with

⁴ Section 351 stipulates: “A winding up of a company shall be a creditors winding up of the resolution contemplated in Section 349 so states, but such a resolution shall be of no force and effect unless it has been registered in terms of Section 200.”

⁵ Boschpoort Ondernemings Pty Ltd v ABSA Bank 2014 (2) SA 518 SCA para 15-22

⁶ My underlining

substantial liabilities which it could not pay, the company was unable to pay its debts and it was placed in winding up in terms of Chapter 14 of the 1973 Act.⁷

[19] Therefore there is no merit on this ground of exception and it is hereby dismissed.

The second ground of exception

[20] The second ground of exception was premised on the argument that section 424, properly interpreted, does not establish any liability in respect of a juristic entity. It only creates liability for natural persons.

[21] The excipient reasoned as follows:

21.1 A juristic person was not contemplated in the term "person" in the 1973 Act. Hence a company could not be held liable in terms of Section 424. It was only in the 2008 Act where the word "person" was extended to include a juristic person;

21.2 the intention of the legislature in invoking of Section 424 was to specifically impose personal liability against natural persons who carried out their obligations recklessly, grossly negligently, or fraudulently on behalf a company. This provision was aimed to hold directors and others such as managers, company secretaries, and employees who are instrumental in mismanaging a company's affairs to be held personally accountable. They could no longer hide behind the company.⁸

⁷ Paragraphs 6, 49,50 and 66 of the particulars of claim

⁸ Henochsberg Volume 2 APPI-290

[22] It further relied on Roux J's finding in ***SA Mutual Life Insurance Society and Others v Cooper and Others N.N.O.***⁹ The said judgment was referred to by the Supreme Court of Appeal in ***Cooper and Others N.N.O. v SA Mutual Life Insurance Society and Others.***¹⁰ Therein the Supreme Court of Appeal noted Roux J's finding namely that Section 424 does not create liability for juristic persons but only for natural persons mainly due to the wording "personally liable" contained therein. It however noted that the court in ***Anderson***¹¹ held a contrary view.

[23] On my reading of ***Cooper*** in context, it is evident that the Supreme Court of Appeal made no finding on the said issue. Hence the obiter remarks of the court cannot bind this court.

[24] The court in ***Anderson*** held the contrary view that a company may be held liable under Section 424. At 109I to 110B it expressed that:

"It is of course correct that Section 424 may not be invoked against a company merely on the basis that it is vicariously liable on account of the conduct or fault of its servants or agents ... it does not follow, however, that a company cannot be held liable under Section 424." It is equally clear one has to distinguish between a situation in which it is sought to invoke Section 424 to hold a company liable on

⁹ This judgment could not be located by counsel for both parties. The court was informed that the legal representatives had undertaken all possible searches, but it was to no avail. The excipient requested the court to consider Roux J's view as it constitutes a decision from this Division. I must express that without a copy of this judgment I cannot blindly follow Roux J's finding. It is necessary for me to have regard to the said judgment and consider the context in which such a finding was made.

¹⁰ 2001 (1) SA 967 (SCA) at paras 15 and 16 (Cooper Judgment)

¹¹ *Anderson and Others v Dickson and Another N.N.O.* 1985 (1) SA 93N at 110A-B

account of its own conduct or fault and a situation in which it is sought to hold a company liable on account of its own conduct or fault and a situation in which it is sought to hold the company vicariously liable on account of the conduct or fault of its servants or agents.

[25] The court in ***Simon N.N.O and Others v Mitsui***¹² again confirmed that for a company to be held liable under Section 424, the identity of the individual/directing mind is pivotal, hence acknowledging the liability of a company.

[26] The first defendant's reasoning is flawed. It surely could never have been that the inclusion of liability on the part of a juristic person would exclude personal liability on the part of individuals responsible for managing the affairs of the company. Such individuals fall within the ambit of Section 424 and would be liable if they are found to conduct themselves fraudulently or recklessly and/or being parties in carrying on of the business of the company.

[27] Both texts, namely ***Blackman and Henochsberg***¹³ referred to various authorities that confirmed that the word "person" in the context of Section 424 is defined to include a natural person or any other legal personality, a corporation as an entity with legal personality falls within the category of "any person". When a

¹² *Simon N.N.O. and Others v Mitsui Company Limited and Others* 1997 (2) SA 475 WLD at 529 the court expressed "Henochsberg (opcit at 393), after setting out the English approach, submits that it is not incompatible with our law and indeed has been followed, referring to start with the *Levy v Central Mining and Investment Corporation* 1955 (1) SA 141A where, he says Centliveres CJ (at 149 to 150) refer to the passage from Viscount Haldane Speech in *Lennard Case* supra at 713 "in the case of a fictitious person like a company" one must endeavour as best one can to ascertain who is or are is directing mind or minds.

¹³ *Blackman* 1973 Act, Chapter 14 - 543 and *Henochsberg* 2008 Act, APPI-291
See *Frame Textiles Corporation Ltd v Ciskei Peoples Development Bank Ltd* 1995 (2) SA 177 (KGD)

corporation acts in this capacity, it does not act as a corporation qua corporation, but as “any person” and therefore the provisions of Section 424(1) apply to as a corporation in the context of any person.

- [28] In light of the said authorities supporting the proposition in law that a company may be held personally liable, the second ground of exception cannot be sustained and is hereby dismissed.

The third ground of exception

- [29] This ground of exception was premised on two objections. Firstly, it was contended that the allegation in the particulars that the first defendant exercised *de facto* control over the company is bad in law since the management and control of the company vested in its board of directors and not in its shareholder, the first defendant.

- [30] Secondly, it had to be alleged that the first defendant acquired knowledge of the business of the company through its directors and was knowingly a party to the fraudulent and reckless carrying on of the business of the company.¹⁴ Since the first defendant could only have acquired such knowledge through its directing mind, it had to be specifically alleged that such directing minds had the requisite knowledge and intent. And so it was argued that the plaintiffs failed to set out

¹⁴ On reading of Section 424, a court could declare that any person “was knowingly a party to or any person who knowingly was carrying on the business in the aforesaid manner. Hence both allegations need not be proved.

facts to sustain a conclusion that the first defendant's had the requisite knowledge and intent through its director/s or board.

[31] On this point the plaintiffs firstly, took issue with the first defendant's contention that it had to be pleaded that only the directors and/or Board had the requisite knowledge. The plaintiffs' objection has merit. Although directors of a company are likely to be regarded as its directing mind, there are circumstances when a company's directing mind and will can be non-directors and individuals in management positions.

[32] It was pointed out that in the context of this matter the roles that the different individuals (second to sixth defendants) played would be dealt with in evidence led at the trial.

[33] I am not in agreement with the plaintiffs' reasoning. In my view the second objection raised by the first defendant that material allegations were lacking, namely that knowledge was imputed to the first defendant through the directing minds, has merit. The allegation that the first defendant had the imputed knowledge through its alter ego, directors or others, had to be pleaded.

[34] The court in **Anderson**¹⁵ held that:

"Section 424 cannot be invoked against a company in the absence of evidence that, through its board or any of its directors, acquired knowledge of the business of the company whose affairs are being investigated...If it were shown however

¹⁵ Anderson at para 110 D-E

that the company through its directors had with mala fides or recklessly performed acts to induce credit for another company knowing it to be insolvent and without reasonable prospects of meeting its obligations, then such conduct would support a finding that the first mentioned company through its directors was knowingly a party to the reckless or fraudulent carrying on of the business or affairs of the latter company. See Fisheries Development Corporation at 168 E-F. It then properly be said to have knowingly been a party to the carrying on if the business of the company recklessly or with intent to defraud creditors of the company within the meaning of Section 424.”¹⁶

[35] Wunsch J in ***Simon v Mitsui*** extrapolated on the “directors mind and will doctrine.” It was explained that a company can only gain knowledge through its directing mind, be it a director or some other person involved in the affairs of the company. Hence it was material to identify the person who had management and control in relation to the relevant conduct complained of.

[36] The foundation for a company to have imputed knowledge was premised on the directing mind and will doctrine which allows the law to attribute the mental state of those who in fact control and manage the company itself as being its directing mind and will. The question of whether the mental state of directors or other officers can be attributed to the company as its own depends on various factors. Such factors would include how the management of the company has been conducted and determine who are the responsible persons involved.

¹⁶ Fisheries Development Corporation of SA Ltd v Jorgenson and Another; Fisheries Development Corporation of SA Ltd v AWJ Investments Pty Ltd and others 1980 (4) SA 156W.
See also Philotex (Pty) Ltd v Snyman 1998 (2) SA 138 (SCA) 143

[37] The plaintiffs attempted to illustrate that the necessary allegations were made to impute the necessary knowledge to the company through the relevant directors' minds. Specific reference was made to the particulars of claim, namely:

37.1 at paragraphs 13.1 to 13.5, the particulars of the various individuals and their particular capacities in the first defendant were identified;

37.2 at paragraph 15, it was alleged that second, third and fourth defendants in their respective capacities in the first defendant exercised *de facto* control over the company in relation to the conduct of the company, (inter alia, the arrest proceedings and the appeal to the Supreme Court of Appeal), agreeing to the fraudulent scheme and implementing the fraudulent scheme;

37.3 at paragraph 19, it was alleged that in exercising *de facto* control, the first defendant was represented by the second, third, fifth, and later the fourth defendant;

37.4 participation by the first defendant was also pleaded, namely that it was a party to the sale of the business agreement.

Thus on a sensible reading of the particulars, the basis of attributing knowledge and intent to the first defendant was made.

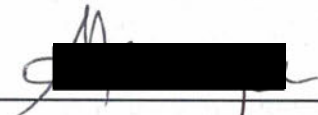
[38] I find that the material allegations to sustain a cause of action were lacking. It had to be pleaded that the first defendant was a party to the carrying on of the business or gained knowledge of the fact that the business of the company was carried on recklessly with the intent to defraud creditors or for any fraudulent

purposes and that the first defendant gained such knowledge and participated in the affairs on the company, through its directing mind/minds.

[39] Our authorities have firmly established that Section 424 cannot be invoked against the first defendant in the absence of allegations or evidence that the first defendant had through its board or any of its directors acquired knowledge of the business of company whose affairs are being investigated.

[40] Every fact which has to be proved must be alleged. The approach to exceptions which claim that the impugned pleading does not sustain a cause of action is well known. The court has to consider the allegations pleaded and assess whether they disclose a cause of action.¹⁷ In this instance, the particulars lacked the material allegations to sustain liability on the part of the first defendant.

[41] In as far as costs are concerned, it is evident that each party was partially successful. In exercising my discretion, I therefore deem it appropriate that costs should be costs in the cause.


H. KOOVERJIE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

¹⁷ Mckenzie v Farmers Co-operative Meat Industries 1922 AD 16 at 23
Stols v Garlicke and Bousfield 2012 SA 415 KZP at 421 I

Appearances:*Counsel for the excipient (first defendant):**Adv. FH Terblanche SC**Adv. AJ Wessels**Instructed by:**Van Greunen & Associates Inc.**Counsel for the plaintiffs:**Adv J Smit**Instructed by:**Messrs JDK Reitz Attorneys**Date heard:**5 June 2025**Date of Judgment:**17 June 2025*