AL SHAMS GLOBAL BVI LIMITED
versus
CHRISTOPHER SAMBADZA

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 18 May and 22 June 2016

Opposed Application

L. Uriri, for applicant
E. Jera with Mr *E. Moyo*, for the respondent

TAGU J: At the beginning of the hearing of this matter, counsels for the respondent took a preliminary point that the last sentence on para 1 of p 42 on the applicant's heads of argument which reads:

> "……Respondent at the material time was also a director of Interfin Bank Limited ("Interfin" or "the Bank"). The Bank which loaned and advanced money to Rodstreet and accepted the Bankers Acceptances issued by Rodstreet."

be struck out on the basis that the whole sentence was new evidence that was being introduced in the heads of argument because it was not anywhere in the papers, it was not in the founding affidavit, it was not in the answering affidavit, and it was not in anything. It popped up for the first time on those heads of argument. The counsel for the applicant opposed the application on the basis that heads of argument are not capable of being struck out. The respondent persisted with the application. It is however, trite that heads of argument need not introduce new evidence not previously pleaded.

However, having read through Mr Jayesh Shah's founding affidavit, and his answering affidavit, as well as all other correspondences filed of record nowhere is it stated that the respondent was also the director of Interfin Bank Limited. This piece of evidence was introduced through the heads of argument. I find merit in the application by the respondent's counsels. That sentence which reads "respondent at the material time was also a director of

Interfin Bank Limited ("Interfin" or "the Bank") is struck out of the applicant's heads of argument. The rest of the sentence is left intact since it was pleaded that Interfin Bank loaned and advanced money to Rodstreet and accepted the Bankers Acceptances issued by Rodstreet.

I now turn to deal with the merits.

BACKGROUND

This is an application based on the provisions of s 318 (1) of the Companies Act [*Chapter 24:03*] ("the Companies Act" which has the effect of, on the direction of this Honourable Court, holding the past and present directors of a company personally responsible, without limitation of liability, for all or any of the debts or other liabilities of a company as the court may direct where they have conducted the business of the company in a fraudulent, negligent or reckless manner. The section says:

> **"318 Responsibility of directors and other persons for fraudulent conduct of business**
>
> (1) If at any time it appears that any business of a company was being carried on –
> (a) recklessly; or
> (b) with gross negligence; or
> (c) with intent to defraud any person or for any fraudulent purpose
>
> the court may, on the application of the Master, or liquidator or judicial manager or any creditor of or contributory to the company, if it thinks it proper to do so, declare that any of the past or present directors of the company or any other persons who were knowingly parties to the carrying on of the business in the manner or circumstances aforesaid shall be personally responsible, without limitation of liability, for all or any of the debts or other liabilities of the company as the court may direct."

What is being alleged *in casu* is as follows: The applicant is a company registered in the British Virgin Island whose principle place of business is Shed No. B1, AL Khabaissi, Dubai, U.A.E. The respondent is a private individual and director of Rodstreet Trading (Private) limited of 14 Crowbrugh Road, Groombridge, Harare. Sometime in or about 22 August 2011, Rodstreet accessed certain facilities from Interfin Bank secured by a certain Bankers Acceptance (BA) issued by Rodstreet and drawn on to the tune of US$117 335.91, availed and accepted by Interfin Bank. The BA's due date was 21 November 2011. Interfin Bank then sold the Bankers Acceptance to the applicant and the applicant became the legal holder of the Bankers Acceptance. On or about 7 March 2012, Interfin Bank advised Rodstreet that it had sold the BA to the applicant and that when the amount due on the BA

became due and payable, such amount was to be paid to the applicant. The BA was presented for payment by the applicant to Interfin Bank on the due date but Rodstreet and Interfin Bank failed to honour or discharge the Bankers Acceptance. The applicant issued a letter of demand to Rodstreet demanding payment of the sum of US$117 335.91. Rodstreet was unable to make any payment towards the amount demanded. The applicant then issued summons against Rodstreet on 27 April 2012 in case HC 4556/12. A default judgment was obtained against Rodstreet on the 18 June 2012. The applicant instructed the Deputy Sheriff to proceed to Rodstreet's place of business and execute the order. On 3 August 2012 the Deputy Sheriff advised that Rodstreet was no longer operating from their premises. Despite a diligent search and enquiry applicant failed to establish where Rodstreet is now operating from.

The applicant averred that the respondent, as a director of Rodstreet at all material times knew or should have known that his Company would not be able to pay amounts owed in terms of the Bankers Acceptance that Rodstreet issued in the ordinary course of its business. They alleged that despite such knowledge of the Company's incapacity to pay in the ordinary course of business, the respondent, being the director of the company, negligently and/or fraudulently represented to Interfin Bank that Rodstreet would liquidate the amount owed on the Bankers Acceptance on the maturity date of the same. Further, the applicant submitted that the respondent knew or ought to have known of the financial position of the Company and its inability to pay amounts owed to applicant in terms of the Bankers Acceptance. Hence this knowledge, or lack of such knowledge of the Company's financial position amounted to gross negligence and reckless trading on the part of the respondent for which the respondent must be personally liable for at law. In its view the respondent owed a duty of care to all parties that Rodstreet conducted business with including the applicant to ensure Rodstreet would be able to meet its financial obligations.

The applicant is now seeking an order that the respondent be declared personally liable to pay applicant the sum of USD 117 335.91, interest at the rate of 30% per annum from 21 November 2011 to date of full payment plus costs of suit.

The respondent opposed the application.

In his founding affidavit the respondent stated that he is no longer a director of Rodstreet (Private) Limited having resigned from the board of the company on 3 November 2011 when he sold his shareholding in the company. He however, conceded that as far he was

aware for a period of time that he cannot remember the company operated an overdraft facility with Interfin Banking Corporation Limited. He further stated that the Bankers Acceptances which forms the main issue in these proceedings was issued entirely and signed by his two co-directors Mr Herbert Rinashe and Phillip Jonasi without his knowledge. To the best of his knowledge no board resolution was ever made to issue the Banker Acceptance in his presence. He said as a banker, he would have strenuously opposed the issuance of a Bankers Acceptance as a way of financing trading stock as he was aware that a Bankers Acceptance has a defined tenure and would therefore be wholly unsuitable to finance trading stock since the Company would not be able to tell with any degree of certainty how long it would take to sell the stock. In his view this would risk creating a mismatch between the maturity of the Bankers Acceptance and the realization of cash from trade.

In short the respondent denied that as a director of Rodstreet he knew or should have known that the company would not be able to pay amounts owed in terms of the Bankers Acceptance because-

1) at all material times he was a non- Executive Director and not involved in the day to day operations of the company;
2) the board of directors never, to the best of his knowledge , information and belief authorised any person to sign the Bankers Acceptance;
3) he did not sign the said Bankers Acceptance nor did he ever deal with it in any way;
4) he never made any representation to Interfin or any other person whatsoever that Rodstreet would liquidate the Bankers Acceptance on maturity or at any time thereafter;
5) he was not grossly negligent or fraudulent or reckless in anyway whatsoever with respect to the issuance of the Bankers Acceptance as he did not even know of its issuance;
6) further, the applicant chose to exclude from suing the existing directors who signed the Bankers Acceptance;
7) and further, to his knowledge , neither Rodstreet nor himself had any dealings whatsoever with applicant. It was his contention that the applicant put itself in the position that it found itself in buying or accepting a Bankers Acceptance from Interfin without doing its own due diligence for the applicant had a duty to perform at least some minimum amount of due diligence to satisfy itself. Hence no reckless or fraudulent or gross negligent trading is attributable to him.
8) Lastly he challenged the rate of interest at 30% per annum and argued that this has not been proved.

What is not in dispute is that on or about the 3rd of November 2011 the respondent was still one of the directors of Rodstreet (Private) Limited. He resigned from the said company with effect from 3 November 2011. The Bankers Acceptance in issue was drawn on the 22nd August 2011. Its due date was the 21st of November 2011. It is therefore common cause that at the material time when the Bankers Acceptance was drawn and the money was advanced, the respondent was a director of Rodstreet. Interfin Bank Limited sold the said Bankers Acceptances to applicant before the respondent resigned from Rodstreet (Private) limited. Interfin Bank advised Rodstreet that it had sold the Bankers Acceptance to the applicant on or about the 7th of March 2012 after the respondent had resigned from the company.

The Bankers Acceptance was presented for payment by the applicant to Interfin Bank on due date but Rodstreet and Interfin Bank failed to honour or discharge the Bankers Acceptance. This resulted in a default judgment being granted against Rodstreet (Private) Limited after it was sued by the applicant. The company's whereabouts is now unknown.

The main issue to be decided is whether or not the respondent as a past director of Rodstreet is personally liable in terms of s 318 (1) of the Companies Act [*Chapter 24.03*] for the liability of Rodstreet in accessing certain facilities secured by a Bankers Acceptance which Rodstreet defaulted in honouring on its due date.

It is trite that the provisions in s 318 (1) of the Companies Act extends personal liability not only to "the past or present directors of the company" but also to "any other persons who were knowingly parties to the carrying on of [its] business" recklessly or with gross negligence or with intent to defraud. See *David Govere* v (1) *Ordeco (Private) Limited (2) Registrar of Deeds* SC -25/14.

In *casu* once it is found that the respondent was liable, further issues to be decided are whether or the respondent carried the business of Rodstreet recklessly, with gross negligence or with intent to defraud. In the present case although the respondent resigned mere days before the maturity of the Bankers Acceptance, this does not protect him from being personally liable for the debt arising therefrom, as the material time was actually the time when the Bankers Acceptance was drawn up and the sum in question was advanced. This is because, this was the time when due consideration of the financial and business state of the company, and whether or not the company could afford to repay any loans or other debts falling on it. Liability therefore falls squarely on respondent's shoulders.

The respondent sought to deny liability on the basis that he was not an executive director of Rodstreet. I do not agree with that. In the case of *Howard* v *Herrigel* and another 1991 (2) SA 662 at p 674 the court held:

> "In my opinion it is unhelpful and even misleading to classify company directors as "Executive" or "non-Executive" for purposes of ascertaining their duties to the company or when any specific or affirmative action is required of them. No such distinction is to be found in any statute. At common law, once a person accepts an appointment as a director, he becomes a fiduciary in relation to the company and is obliged to display utmost good faith towards the company and in his dealings on its behalf. That is the general rule and its application to any particular incumbent of the office of the director must necessarily depend on the facts and circumstances of each case. One of the circumstances may be whether he is engaged full time in the affairs of the company….However, it is not helpful to say of a particular director that, because he is not an "Executive director", his duties were less onerous than they would have been if he were an Executive director. Whether the enquiry be one in relation to one's negligently, reckless conduct or fraud, the legal rules are the same for all directors."

Therefore, the fact that respondent was not an Executive director does not absolve him from personal responsibilities for the company's debts and liabilities under s 318 (1) of the Companies Act.

As to what constitutes recklessness, gross negligence and fraud this was decided in a number of cases. In the case of *Chibwe t/a as Ross Motors (Private) Limited* v *Fawcett Security Operations (Private Limited & Anor* HH 79/2006 Bhunu J (as he then was) citing *Rosenthal* v *Marks* 1944 TPD 172 described gross negligence as being tantamount to wilful non-performance of one's contractual duties and obligations. See also *Philotex (Pty) and Others* v *Snyman and Ors; Braitex (Pty) Ltd and Ors* v *Snyman and Others* 1998 (2) SA 138 (SCA); *Ozinsky NO* v *Lloyd and Ors* 1992 (3) SA 396. *Ebrahim and Another* v *Airport Cold Storage Pvt Ltd* 2008 (6) SA 585 and Expart Lebowa Development Corporation Ltd 1989 (3) SA 71 (T).

Given the facts of this matter it is my view that drawing up the Bankers Acceptance and accepting the money despite knowledge of the Company's precarious financial position was within the respondent's knowledge. The liability at law, is not in a company accepting a time-bound debt, but in allowing an insolvent company to keep on trading to create a good impression of the company. As a director the respondent had a duty of care in the running of the company which he failed to uphold. As submitted by the applicant it is inconceivable that, of the extent of liability owed by Rostreet, only the Bankers Acceptance were recklessly taken by Rodstreet, and the remainder of the debt was good debt. The facts in this case show that Rodstreet failed to service the indebtedness arising out of the Bankers Acceptance at all

despite the fact funds were received. Therefore, it can safely be concluded that the directors including the respondent, traded recklessly in general and in particular in the securing debt with Bankers Acceptances. The board of directors which then included the respondent conducted the business of the company in a manner which contravenes the provisions of the Companies Act. The respondent, therefore conducted the business of Rodstreet recklessly, negligently if not fraudulently and in this regard is consequently personally liable.

In the result the application is granted and I accordingly make the following order-

IT IS ORDERED THAT

Respondent be and is hereby declared personally liable to pay to the applicant:

(a) The sum of USD 117 335.91;
(b) Interest on the sum of USD 117 335.91 at the rate of 30% per annum from 21 November 2011 to the date of payment in full; and
(c) Costs of suit.

Dube Manikai & Hwacha, applicant's legal practitioners
Moyo and Partners, respondent' legal practitioners