TOAKOANA TRADING (PVT) LTD
versus
CORINNE VAN ROOYEN
and
CORNELIUS VAN ROOYEN

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 9 September 2014 & 3 December 2014

**Civil trial**

*D. Ochieng,* for the plaintiff
*R. Makamure,* for the defendants

MAFUSIRE J: The first and second defendants were wife and husband. From now on I shall refer to them as "***Corinne***" and "***Cornelius***". They were the sole shareholders and sole directors in a company called Corvan Enterprises (Pvt) Limited (hereafter referred to as "***Corvan***" or "***the company***"). The name "**Corvan**" was word play on their names: "***Cor***" from ***Cor***inne and/or ***Cor***nelius, and "**van**" being the "***van***" before Rooyen.

The plaintiff and Corvan were fish mongers. The plaintiff sold and supplied kapenta on wholesale. Corvan sold it on retail. At the relevant time Corvan owed the plaintiff US$53 690-00. The plaintiff issued summons. But Corvan went bankrupt before the claim had been determined. It was placed under provisional liquidation at the instance of one of the creditors. In the action before me the plaintiff sued Corinne and Cornelius in their individual capacities to pay what Corvan owed. In the main, the plaintiff alleged a fraudulent misrepresentation. In the alternative, it based its claim on s 318 of the Companies Act, [*Cap 24:03*] (hereafter referred to as "***the Act***").

The details of the plaintiff's claim against Corinne and Cornelius in their individual capacities were these. Between February and October 2012 the plaintiff sold and supplied Corvan with kapenta. By October 2012 Corvan's debt was US$38 000. Corvan, through Corinne, ordered more fish. The plaintiff's case was that but for Corinne's fraudulent misrepresentation it would not have parted with its fish in the first place, let alone supply more fish later on. Corinne is alleged to have represented to the plaintiff that if it supplied

more fish either she or Corvan would pay the whole amount in due course. Payment would be made in November 2012.

November 2012 came and went by. No payment was made. Corinne's misrepresentation was said to be this. As she ordered more fish she and Cornelius knew that they had misappropriated Corvan's assets. As a result, Corvan did not have the capacity, or any reasonable prospect to pay. The plaintiff also said that Corinne had never sincerely intended to pay.

The claim against Corinne and Cornelius was for US$63 345, allegedly being the value of the fish at the time of the summons.

To prove its case the plaintiff called two witnesses. One was Lizette Nortier ("***Lizette***"). The other was Neville George Mountford ("***Neville***"). From her evidence Lizette was the bookkeeper – cum – credit controller – cum - accountant – cum – manager – cum – marketing manager.

Lizette confirmed the supply of fish to Corvan at Corinne's instance. She said Corinne had arranged some form of credit facility with the plaintiff through one of its directors. She confirmed Corinne had ordered more fish in the face of an existing debt promising full payment for both the old and the new debt. On the strength of that promise the plaintiff had parted with 100 bags of fish in the first instance. Corinne had wanted 300 bags. She had come back for the outstanding 200. To convince the plaintiff to part with the outstanding 200 bags in the face of mounting indebtedness Corinne had explained that she had courted an offshore investor. The investor would deposit US$75 000. It was then arranged between Corinne and the plaintiff that she would ensure that the deposit would be made directly into the account of plaintiff's holding company in Mauritius. Later Corinne said this had been done. She brandished a SWIFT bank transfer showing a deposit of US$75 000 into the account of plaintiff's holding company sometime in November 2012. On that basis the outstanding 200 bags of kapenta had been released. Strangely, the funds were never received into the account of the plaintiff's holding company. The debt remained unpaid. Then in December 2012 Corinne announced the provisional liquidation of Corvan.

As to the defendants frittering away company funds and stripping off company assets, Lizette said Corinne had bought Cornelius an expensive motor cycle, a Harley Davidson, using Corvan's funds. Furthermore, she and Cornelius had paid for a house for their daughter using Corvan's funds. As to the details of such misuse of Corvan's funds Lizette left it all to the plaintiff's next witness, Neville.

The plaintiff's next witness, Neville, had been employed by Corvan as the sales manager between 2010 and 2012. He had quit in frustration and without giving notice. He was not being paid. He was having to rely on his family to keep going. Neville said part of his duties involved collecting cash from Corvan's customers. Corinne used to send him with large sums of money to certain people. Frequent payments were made to one Mr Yaya ("***Yaya***"), a friend of the defendants. Neville said on one occasion he delivered as much as US$39 000.

Neville further explained that other huge payments were being made to a company called Expeller Investments (Private) Limited ("***Expeller***"). He said there was a debt factoring arrangement between Corvan and Expeller. In terms of it Expeller would buy Corvan's invoices to its customers'. To recover its money Expeller would collect from those customers. Collections made by Corvan had to be remitted to Expeller. But frequently they were not. Instead, they would be paid to third parties or spent by Corvan.

Neville further testified that at times he was instructed to transfer large sums of Corvan's money into Corinne's offshore accounts. On one occasion Corinne was in the United Kingdom. She needed money deposited into an HSBC Bank account domiciled in the Isle of Man. It was a personal account. Corvan's banks were Stanbic and Barclays. Corinne told him she required the money to purchase stock for Ella's Décor. Ella's Décor was a little shop operated by the defendants' daughter, but from Corvan's premises. It sold stuff for home décor. In cross-examination Neville said when Corvan experienced financial difficulties Ella's Décor would loan it some money. When asked about a house in Greendale, Harare, Neville said the previous owner used to come to collect money from Corvan.

After Neville the plaintiff closed its case.

In their plea the defendants strenuously denied any personal liability towards the plaintiff. They averred that in the course of their dealings, they acted as no more than directors and agents for the company. Corvan was not their *alter ego*. They never gave out any personal guarantees for the payment of Corvan's debts or held themselves out as co-principal debtors. They denied any form of misrepresentation whatsoever, let alone one that was fraudulent. They also denied conducting Corvan's affairs recklessly or negligently and averred that at all times they had acted in good faith and for the good of the company. They denied having derived any personal benefit from Corvan's funds beyond what was permitted by law.

The defendants further pleaded that Corvan's liquidation was neither reasonably foreseeable nor intended. It was caused by economic factors beyond their control, such as the financial distress of Corvan's own customers. They claimed that Corvan had enough assets to cover its liabilities and that the plaintiff had to wait for the liquidation process to conclude in order for them to get paid. They stressed that the plaintiff had already submitted proof of its claim to the provisional liquidator and that in its papers it had acknowledged that Corvan was solely responsible for its debt.

The defendants called two witnesses. The first was Corinne herself. In summary, her evidence was that she did all she could to make Corvan meet its obligations to its creditors, including the plaintiff. She had made effort to recapitalise it. However, despite all her best intentions everything had flopped. The biggest single let-down had been by a potential investor. It had appeared on the scene at the critical moment. Hopes had been raised. Corvan seemed on the road to recovery. Unfortunately, it subsequently turned out that the investor was no more than a mirage. It had just fizzled out.

The chronology of Corinne's evidence was this. Corvan had been a family business. It had been established in 1992. The company had been dear to her and her husband. They had grown it from a small concern to what it had become. Corvan's business relationship with the plaintiff spanned over fifteen years. Their trading terms had been cash on delivery. However, when Corvan started experiencing financial difficulties, Chris Hoggart ("***Chris***"), one of the plaintiff's directors, had agreed to offer some credit terms.

When the situation deteriorated significantly, it was decided to look for an investor to inject fresh capital into the business. It was also decided to sell Corvan on a "walk-in walk-out" basis. She gave the agency to some estate agents, among them Robert Root and Fox & Carney. Robert Root became the lead agent. The point person was one Suzanne Maureen Beresford-Miller ("***Suzanne***"). Corvan was put on the market. Apart from the business it also had its own factory. In October 2012 a non-governmental organisation ("***Ngo***") fronted by someone called Tara Wilkins ("***Tara***") who was based in, or whose source of funds was Italy, and another lady called Mercy Masvikepi ("***Mercy***") who was locally based, made an offer to buy. The offer was more than the asking price. The asking price had been US$2.5 million. The Ngo offered US$2.7 million. That included the cost of goodwill and the cost of keeping Corinne and any support staff during the "walk-in" and "walk-out" period. The deal seemed genuine. The NGO seemed serious. It said it was looking to invest in Zimbabwe. Among

other things, Corinne met with Mercy and their lawyer. Corrine had also done a background check on it through her bankers.

However, the deal soon collapsed. For some reason the Ngo would not submit proof of funds as required by the estate agents. Corinne explained to it the desperate financial situation Corvan was facing and the inevitable collapse if funds were not released immediately. As a stop gap measure, the Ngo offered to pay Corvan's kapenta suppliers directly. Armed with that promise Corinne approached Chris and negotiated the supply of more fish. The plaintiff's bank details were transmitted to the Ngo. At some stage in November 2012 the amount of US$75 000 actually reflected in plaintiff's offshore bank account. Documentary evidence to that effect was produced. But the funds were never transferred. By that time the plaintiff had already released the 300 bags of kapenta.

There was also documentary evidence of further cheque deposits into Corinne's off-shore account allegedly by the same Ngo. The amounts were US$55 000 and US$47 310-33 on 6 and 12 December 2012 respectively. However, the deposits would inexplicably be reversed immediately after being made.

There was further documentary evidence in the form of print-outs of a series of e-mail and telephone messages at the relevant time. They showed that Corinne actively engaged both the Ngo and the plaintiff. She was appealing to the plaintiff for understanding and patience as she pressed the Ngo to expedite the release of the money.

On the Harley Davidson, a prominent feature of plaintiff's case, Corinne said the motorbike had been meant to be a surprise fiftieth birthday present for Cornelius in 2010, but that due to lack of funds she had failed to buy it for him then. Cornelius had eventually bought it himself out of his own savings.

On the payments to Yaya, Corinne admitted that he was not one of Corvan's creditors. However, Corvan had used the money that he had loaned Ella's Décor for the purchase of a house. The house had eventually been purchased in Greendale, Harare. Therefore, Corvan was paying back that loan. Yaya's money had also been utilised to procure goods for Ella's Décor. Ella's Décor had no bank account of its own.

On the documentary evidence was an interim report by the provisional liquidator. Among the list of creditors was Expeller. The debt due to it was standing in excess of US$1.3 million. Yet the estimate of the recoverable debtors on that report was no more than US$20 000. Asked to explain how there could be such a huge discrepancy given that in terms of the debt factoring agreement uncollected invoices would have been sold off to Expeller, Corrine

said she could not properly account for the difference except to attribute a significant portion of that debt to interest. She also conceded that the money collected on some invoices had not been remitted to Expeller but had been ploughed back into the company to keep the operations going.

On stripping of company assets, Corinne denied the allegations and said they had been selling their own personal property, including vehicles, to keep Corvan afloat.

A great deal of the documentary evidence by the defendants, particularly print-outs of the e-mail and telephone messages that reflected Corinne's active engagement with the plaintiff was only discovered on the day of the trial. Questioned on why it had been left so late to discover such important documents, Corrine explained that when she had filed her discovery affidavit, the issue of such documentation had never been brought to her attention by the legal practitioner who had prepared the first discovery affidavit. It was only towards the trial that her new legal practitioner, albeit from the same firm, had highlighted the importance of those documents. As a result, a supplementary discovery affidavit had had to be filed.

The second and last witness for the defendants was Suzanne. She had vast experience in the property world spanning over twenty-two years. At the time she was a property consultant with Robert Root. Corinne was her close friend for close to twenty years. Suzanne confirmed Corinne's instructions to sell Corvan. She corroborated Corinne's evidence on dealings with, and eventual disappointment by, the Ngo.

One highlight of Suzanne's testimony about which the plaintiff grilled her was the absence of any documentary evidence of any sort of the alleged agreement with the Ngo. The plaintiff queried how any normal investor would be prepared to part with as much as US$75 000 or the subsequent deposits of US$55 000 and US$47 310-33 without any agreement of sale. The plaintiff also questioned why, if an agreement had indeed been concluded with the Ngo as Suzanne alleged, Corvan had remained on the market. She replied that it was the practice or the custom in the property world, particularly in situations when money is tight, that only until acceptable evidence of proof of funds had been remitted, would a property be removed from the market. Offers are never taken at face value. She maintained that the Ngo's offer had indeed been drafted on the basis of which an agreement of sale at US$2.7 million had been concluded. However, Suzanne said, her computer had crashed soon afterwards. She had no other evidence of the agreement apart from the numerous e-mail exchanges the print-outs for which had already been produced.

Suzanne also corroborated Corinne's evidence on the character of the Ngo's representatives that they had dealt with. They were well presented. They spoke well. They were discrete and calculative. There was no reason to doubt their capacity to pull through the deal. Finally, Suzanne insisted that Corinne had acted reasonably and diligently in believing that the money had been available.

After Suzanne, the defendants closed their case.

That was the totality of the evidence before me. Going by their closing submissions both parties also seemed to agree. Their differences were only in respect of their analyses of that evidence and their conclusions from it.

The joint pre-trial conference minute listed the issues for trial as follows:

- Did the first defendant make fraudulent misrepresentations to the plaintiff as regards the capacity of Corvan Enterprises (Private) Limited to pay its actual or future debts to the plaintiff?

- Whether or not the plaintiff suffered damages due to the alleged fraudulent misrepresentations made by the first defendant, and if so, the quantum thereof;

- Whether or not the defendants carried on the business of Corvan Enterprises (Private) Limited fraudulently, negligently and/or recklessly and should therefore be [held] personally liable in terms of s 318 of the Companies Act [*Cap 24:03*].

The onus of proof was on the plaintiff on all the issues.

In my view, a claim such as the plaintiff's herein, where the shareholders or directors of a company face personal liability for the company's debts, is classically an application to pierce the corporate veil of the company. It is basically an application to ignore the fiction that a company is a legal or juristic person, which is clothed with, as s 9 of the Act provides, the capacity and powers of a natural person with full legal capacity in so far as a body corporate can exercise such capacity. Section 22 of the Act limits the liability of the members of the company to contributing to the assets of the company in the event of winding up. It also says that from the date of its incorporation a company becomes a body corporate by its registered name. It attains perpetual succession which remains unaffected by the death of its

members. In the celebrated nineteenth century English case of *Salomon* v *Salomon & Co*.[1] LORD MACNAGHTEN put it as follows[2]:

> "The company is at law a different person altogether from the subscribers …. [T]he company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers, as members liable, in any shape or form, except to the extent and in the manner provided by the Act."

A claim to pierce the corporate veil essentially runs counter to certain fundamental principles of company law as provided for by statute or established by the common law. In terms of s 8 of the Act, every company limited by shares, as Corvan was, is required to include and display in its name the word "limited". That is a warning, especially to potential creditors of the company. Among other things, in the event of the company going insolvent, the liability of the members on winding-up becomes limited to no more than the amount still owing on their shares if they were not fully paid up. If they were fully paid up, the shareholders only lose their capital. TETT and CHADWICK[3] point out[4] that in giving credit to a company a creditor knows that his remedy will be confined to the assets of the company. This will be the capital if all the shares are fully paid up. If not, it will be the capital and such amounts as are still owing on those shares. The creditor will not look to the personal assets of the shareholder even if the capital be insufficient to pay off his debt.

Therefore, to present a claim such as the one *in casu*, the plaintiff's must bring himself within one or other of the exceptions to the rule, either as prescribed by statute, such s 318 of the Act, or the common law. From time to time the courts will rend the company's corporate veil to get to the members hidden behind it. This happens where, for example, the company is a sham or where it has been used as a tool to cause harm to others, or where it would be flagrantly unjust to leave the veil intact. LORD DENNING MR put it this way in *Littlewoods Stores* v *I.R.C*[5]:

> "The doctrine laid down in *Salomon's* case has to be watched very carefully. It has often been supposed to cast a veil over the personality of a limited company through which the courts cannot see. But that is not true. The courts can, and often do, pull off the mask. They look to see what really lies behind."

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[1] [1897] A.C. 22, HL
[2] At p 51
[3] *Rhodesian Company Law,*
[4] At p 61
[5] [1969] 1 WLR 1241 CA @ p 1254

Mr *Ochieng*, for the plaintiff, urged me to find that the defendants had the requisite fraudulent intent to prejudice creditors, including the plaintiff, in the manner that they conducted Corvan's business. His argument implied or insinuated that the defendants were complicit in the debacle pertaining to the fake deposit of US$75 000 which was what induced the plaintiff to part with more fish in the face of an outstanding debt.

In a contractual context, fraud consists of an intentional misrepresentation of material facts that induces a party to enter into an agreement he or she would otherwise not have entered into but for the misrepresentation, causing him or her actual or potential prejudice. In *Stanbic Bank Zimbabwe Ltd* v *Durand*[6] GOWORA J, as she then was, said[7]:

> "A party seeking to rely on such representation must allege **an intention** on the part of the maker of the representation that such representation was made [to] induce the party to whom it was made to enter into a contract. The plaintiff must further allege that the maker of the representation **intended or may be presumed to have intended** that the representation be acted upon." (my emphasis)

In *Attorney-General v Paweni Trading Corp (Pvt) Ltd & Ors*[8] KORSAH JA said[9]:

> "Generally speaking, fraud consists in **knowingly** making a false representation of fact **with the intention to defraud** the party to whom it is made, and such false representation actually causes prejudice or is potentially prejudicial to another." (my emphasis)

Thus fraud is not mere *culpa*. There has to be *dolus*. In the case before me, I have found nothing in Corinne's conduct from which to infer fraud. The e-mail exchanges and "sms" telephone messages in November 2012 between herself and the plaintiff on the one hand, and between herself and the potential investor on the other, depicted a distressed director genuinely trying to secure a life line for the company, and at every stage keeping the plaintiff, the creditor, abreast of developments. A sample of such exchanges will illustrate the point.

- 9 November 2012; Corinne to Chris: "***Hi Chris. Please see the attached transfer that I have been sent for your payment. Please go through and check everything***."

- 12 November 2012; Lizette to Corinne: "***Hi Corinne. Thanks for your e-mail. I have just checked our account and your payment is still not reflecting.***

[6] 2007 (1) ZLR 398 (H)
[7] At p 401B - C
[8] 1990 (1) ZLR 24 (SC)
[9] At p 27

***Please check and get back to me as soon as possible. I also checked the details and they are correct***."

- 26 November 2012; Corinne to Lizette: "***Hi Lizette. I have got a message through to person who did transfer. They are aware your payment not come through and said they will organise cash this week. I am not able to phone them at the moment only send messages. Sorry there is nothing more I can do but keep pressure on them***."

- 27 November 2012; Corinne to Lizette: "***Hi Lizette, we are hoping to receive cash from these people that did the transfer tomorrow***."

- 27 November 2012; Lizette to Corinne: "***Dear Corinne. Thank you for your sms yesterday. I find it difficult to believe that the transfer was done more than a month ago and is still not reflecting in our account. Yet, in your sms you imply that the person who did the transfer is aware that it has not been done. Your account with us is $53 690. Most of the fish bought by you was at a price of $150 per 30kg. $53 690 divided by $150 = 358 bags outstanding, which in todays value = 358 bags kapenta @ $200 per 30kg = $71 600. This is what I tried to explain to you. Please ensure that every effort will be made to settle this outstanding bill***."

- 28 November 2012; Corinne to Lizette: "***Hi Lizette. I don't know what to say other than I was promised that it had been debited off the account and would be in your account. The person that did it is here but very bad network where they currently are. They are aware as I said that you obviously have not had your funds and that i[t] has put me in a very difficult position with you, hence they are trying to sort the cash. I am desperately trying everything I can to sort this and as I said I will keep you informed***."

- 29 November 2102: Corinne to Lizette: "***Nothing yet. / I am waiting for anytime. Checking account every hour. Unfortunately I have no coms with them. Sorry but I cannot do more am really desperately trying***."

- 30 November 2012; Corinne to Chris and Lizette: "***Dear Chris/ Lizette. My apologies this person still has not paid us the cash promised yet. We are owed over a hundred thousand by them and I do not know what has happened as we have been promised that cash will be paid in once it became evident that the transfer had not come through. As I have explained I am unable to reach them by phone and have to wait for them to phone me. Chris I did explain to you the reason why. This has put us in a very difficult position now as we have no other way of paying you. We are desperately trying to secure a loan to trade our way out of our financial mess that we are in. If this fails we have no choice but to go into liquidation. We are hoping to have an answer on the loan by middle of next week. Obviously I am hoping that this cash will be deposited and am checking our account all the time. Whilst I realise this is putting a huge strain on your finances, please***

> ***rest assured that firstly this was never intentional and I do apologise sincerely for this and that I am trying everything I can to avoid the liquidation and to get you paid. Chris you know that I do not play games of ducking and diving but did feel that it is prudent to put you into the picture of exactly where we are at. Again my sincere apologies. I will keep you updated the minute I have anything***."

- 14 December2012; Corinne to Lizette: "***Hi I have received some funds into my overseas account but they are yet to clear. A payment from an investor is also being made from UK to my Harare account today. I do not expect to receive this till late next week wherein I can settle. Our company in liquidation but we do have investor***."

In court, as in her e-mail and sms messages, Corinne displayed sincerity. I find that she or Corvan was a victim of chancers. The potential investor turned out to be counterfeit. There was another one, a Zimbabwean based in Namibia. He appeared on the scene also in November 2012. He kept changing the goal posts. In the end he simply fizzled out as well.

I am satisfied that there was no fraudulent conduct or intent on Corinne's part. Her business relationship with the plaintiff spanned over fifteen years. First it was with Chris' brother, then with Chris himself, and later on with Lizette. Corvan's fortunes started to deteriorate in 2011. There was no suggestion that Corinne kept anything away from the plaintiff. On the contrary, as the exchanges showed, during the worst and defining period she actively communicated every material development to the plaintiff. That Corvan eventually went under leaving plaintiff's debt unpaid cannot, and was not, the evidence of a fraudulent conduct or intent on her part.

Mr *Ochieng* questioned the authenticity of the e-mail and sms messages. His strong argument was that the print-outs were only discovered on the day of the trial, i.e. more than two years later. However, I found them quite genuine. Among other things, Lizette, the plaintiff's own witness, confirmed the exchanges. The sms transcriptions were downloaded from her own mobile phone.

Furthermore, the messages in those texts were contemporaneous to the events as they unfolded. For example, the deposit of US$75 000 at one time did indeed reflect in the plaintiff's Mauritian bank account or that of its holding company as had been arranged. That the actual funds were never credited was not Corinne's fault, let alone her intentional design.

Still further, the deposits of US$55 000 and US$47 310-33 in December 2012 about which she had immediately communicated to the plaintiff, were indeed reflecting in her account. That they were subsequently reversed was again not her fault. Mr *Ochieng* charged

that Corinne should have produced the actual dishonoured cheques for her to be believed. However, she explained that all the relevant documents had been handed over to the provisional liquidator. Incidentally, the provisional liquidator, a practising legal practitioner, who *inter alia* would, on appointment, have investigated Corvan's affairs in accordance with the powers vested in him, and whose interim report both parties appeared to accept without question, noted Corinne's efforts to woo potential investors, their lack of seriousness and their counterfeit deposits.

It seems Corinne was the driving force behind Corvan. Cornelius seems not to have played any active role. He did not even testify. However, no issue was taken of that. At any rate, that Cornelius may have been a passive director would be immaterial. As a co-director and co-shareholder in Corvan, his fate would be the same as that of Corinne. Such a situation obtained in the case of *Ozinsky NO* v *Lloyd & Ors*[10]. In that case the driving force behind the business was the wife, the first defendant, and her brother, the second defendant. The husband, the third defendant, was no longer actively involved when the company went into liquidation. In an action to find the directors personally liable for the company's debts, the South African Appellate Division said of the third defendant[11]:

> "The third defendant, so the Court *a quo* found on the probabilities, likewise had faith in the first defendant's resources. His view of the future of the company would not have differed materially from that of the second…….. At 407B – C the Court said:
>
> > '**The third defendant did not testify, but no issue was made of this and it was accepted by *Mr Nelson* (for the plaintiff) that third defendant had played no active role whatsoever in the management of the company and had concurred in all the decisions made by the first defendant, who remained the driving force behind the venture and was solely in control of the company's financial requirements**.'"

In the circumstances, I exonerate both Corinne and Cornelius from the allegations of fraud.

In the alternative, the plaintiff submitted that if I did not find evidence of fraud then I must find that the defendants carried on Corvan's business recklessly, or with gross negligence or with intent to defraud any person or for a fraudulent purpose, within the meaning of s 318 of the Act. That section reads:

> "**318 Responsibility of directors and other persons for fraudulent conduct of business**

[10] 1995 (2) SA 915 (A)
[11] At p 919

(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."

To start with, in view of my findings on fraudulent misrepresentation above, it follows that paragraph (c) of that section automatically falls away.

The plaintiff's argument was hinged on the fact that in the face of a rapidly deteriorating financial situation, the defendants would see it wise to spend money on such items as the Harley Davidson motorbike which was for personal use. It was also argued that the defendants siphoned money from Corvan for personal use or for the benefit of their daughter. The Expeller debt was one huge hole that remained unexplained.

In my view, a judicial officer called upon to impeach the conduct of directors of a company for perceived wrongful conduct in the running of the affairs of the company where harm as ensued must be too careful to avoid an armchair approach in judging that conduct. Directors must of necessity be diligent in their conduct of business and devote their skill for the good of the company. In practice they sometimes have to make important decisions on the spur of the moment and sometimes have to take drastic action without much time to think through the consequences. Their perceived lack of foresight cannot readily be assessed on the basis of knowledge gained in hindsight. GOWER[12] summed it up as follows:[13]

"Full-time employees are obviously bound to devote their whole time and attention (during usual office hours) to the business of the company, and solicitors, accountants, and secretaries are expected to display the normal skill of members of their professions. Full-time managing directors are also expected to display similar *diligence* but it is not yet clear whether there is, so far as they are concerned, any objective standard of *skill* to which they must measure up. ……

The judges have faced one further difficulty. Whereas their training and experience make them well equipped to adjudicate on questions of loyalty and good

[12] *Principles of Modern Company Law*, 4th ed.
[13] At pp 603 - 604

> faith, they move with less assurance among complicated problems of economics and business administration. Hence, they display an understandable reluctance to interfere with the directors' business judgment – a reluctance of which many examples will be found throughout the whole area of company law. Perhaps, too, they are conscious of the possible unfairness of attempting to substitute their hindsight for the directors' foresight, and are therefore unwilling to condemn directors even though events have proved them wrong."

The cost of the Harley Davidson motorbike was not disclosed. Nor was the cost of the Greendale house. Understandably, it was not, and could not have been, the plaintiff's case that but for the purchase of those items Corvan would not have sunk. I believe that all that the plaintiff had to demonstrate was recklessness or gross negligence in the use of Corvan's funds, of which the purchase of those specific assets would have been part.

In *Mayhew* v *Alcock*[14], a case Mr *Ochieng* said was on all fours with the present, the directors were found personally liable for the company's debts. Among other things, they had fiddled with the value, and therefore the price, of an immovable property of the insolvent company that they sold to a third party. They did this by deflating the agreed price of that immovable property, and inflating by the same amount, the price of the movable assets of a sister company whose assets were being sold at the same time and to the same third party buyer. To that buyer the fiddling was of no consequence. It would end up paying the same amount. The directors also sponsored from company funds their own air fares as well as those for their daughter who had no connection with the company, to holidays overseas. The court held that to render a director personally liable in such circumstances there must be at least an element of dishonesty in the manner he carried on the business of the company. The director was held liable. The court said that it had been shown that certain transactions had been undertaken for a fraudulent purpose.

I disagree that *Mayhew* is on all fours with the current case. The decision in that case was predicated on a finding of dishonesty and fraud, elements that I have found to be absent in this case. *In casu*, for the defendants to be held personally liable, there must be a finding of recklessness or gross negligence.

Section 318 of the Act lists recklessness, gross negligence and fraud separately. It may be a suggestion that the Legislature saw different or distinct elements in each of them. In my view, fraud is certainly a distinct and stand-alone element. But with "recklessness" and "gross negligence" I find it difficult to read different meanings in a practical context. To me

[14] 1991 (2) ZLR 203 (SC)

they are synonymous. In *Rosenthal* v *Marks*[15] "gross negligence" was described[16] as connoting recklessness for an entire failure to give consideration to the consequences of one's action, or a total disregard to duty. In *R.T. Chibwe t/a as Ross Motors (Private) Limited & Anor* HH 79-2006 BHUNU J, citing *Rosenthal*, said gross negligence was tantamount to wilful non-performance of one's contractual duties and obligations.

In my view, "recklessness" or "gross negligence", means someone exhibiting an "I don't care" attitude. One may not intend the harmful consequences of one's actions which are reasonably foreseeable, but nonetheless one persists with that conduct in total disregard of the harmful consequences. Despite the separate depiction of "recklessness" and "gross negligence" in s 318 of the Act, in my view, both refer to the conduct of business in an extremely very bad manner. But no matter how extremely bad that conduct may be, the statute did not, in my view, intend to equate "recklessness" or "gross negligence" with *dolus*, or, with all due respect to BHUNU J in *R.T. Chibwe's* case above, to make it "**tantamount**" to *dolus*. They both remain a question of *culpa*. In *Attorney-General* v *Munganyi*[17], in the context of reckless driving within the meaning of the Road Traffic Act, then No 48 of 1976 (now *Cap 13:11*), where driving "recklessly" and "negligently" are now listed separately and seemingly disjunctively following an amendment to that Act, a pitched argument was presented that because of that amendment, the Legislator intended to create two separate offences. The court rejected that argument. It held that in the context of reckless driving "recklessness" had a well-settled meaning. It is one of the categories of negligent driving which involves a gross and aggravated degree of negligence. It does not require any element of *dolus* (my emphasis).

In my view, despite the noted reluctance of judicial officers to wade into problems of economics and business administration, and despite the caution to avoid judging the foresight of company directors with the knowledge gained in hindsight, I find that Corinne's management of Corvan's financial affairs in the last days was extremely imprudent. It involved a gross and aggravated degree of negligence. It was reckless. My reasons are these. She ought to have scrupulously maintained their own personal accounts separately from those of Corvan and Ella's Décor. I find that, as its name portrayed, Corvan was merely the defendants' *alter ego*. Ella's Décor's parasitic existence prejudiced Corvan's creditors.

[15] 1944 TPD 172
[16] At p 180
[17] 1986 (2) ZLR 137 (SC)

Among other things, it operated from Corvan's premises. It was not paying rent. It was fed from Corvan's bank account. Huge sums of money remained unaccounted for, for example the payments to Yaya, allegedly for a house for Ella's Decor.

The biggest dent, in the defendant's conduct of Corvan's affairs, was, in my view, the disparity between the humongous debt still owing to Expeller at the time of provisional liquidation, and the miniscule amount of invoices still to be collected. If Expeller's debt was US$1 360 000, it meant that, as Mr *Ochieng* argued, Corvan's debtors were once as high as that amount, or, at the very least, US$750 000 as admitted by Corinne herself. The defendants must have collected the money and spent it elsewhere because only US$20 000 remained to be collected. Corinne had no plausible explanation.

Corinne's explanation that Corvan went under because of its own debtors' failure to pay was contradictory. As I have said, on her own version the debtors were once as high as US$750 000. It must mean that all of it except US$20 000 had been collected.

With regards the purchase of the Harley Davidson motorbike, it was not shown that Cornelius had any source of funds other than what he would draw from Corvan. That purchase, whatever the price, but at such a critical time when Corvan's finances were in distress was, in my view, insensitive and therefore reckless. Prudence demanded that expensive birthday presents, undoubtedly from company funds, be deferred.

Corinne was adamant that the creditors would be paid from the liquidation process. However, from the interim report of the provisional liquidator, it seemed highly unlikely. Among other things, the creditors' claims that had provisionally been accepted stood at above US$1.9 million against assets worth US$445 000. It seems that despite Corvan's parlous situation the defendants continued to run it into more debt, including the order for more fish from the plaintiff in the last days. On the provisional liquidator's report, apart from the plaintiff, there were two other suppliers of kapenta. One was owed US$46 109, which the liquidator had provisionally accepted. The other was owed US$811 which had not yet been accepted. Other big creditors, apart from Expeller at over US$1.3 million, were debts for plastic packaging at over US$7 000; security services at over US$7 900; a bank loan at over US$182 000; transportation at over US$10 000; defendants' loan accounts (+US$99 900); employees' terminal benefits (+US$160 000) and statutory creditors such as the National Social Security Authority and dues for an employment council and a trade union.

Recently, in *Ordeco (Private) Limited* v *David Govere & Anor*[18] CHIGUMBA J held the director of the debtor company personally liable for the company's debts in terms of s 318 of the Act, plus the plaintiff's costs of suit in the case where the plaintiff had attempted to recover directly from the company. In that case the director had *inter alia* purposefully ran the company into debts for *inter alia* rent and operating costs and had purported to enter into a consent judgment with the creditor on behalf of the company in circumstances where the company had no capacity to pay. *In casu*, I find the defendants equally responsible.

The plaintiff's main claim was for US$63 345 together with interest thereon at the prescribed rate from the date of judgment, plus costs of suit. The alternative claim was for US$53 690 together with interest thereon at the prescribed rate from 30 October 2012 to the date of payment, plus the plaintiff's costs of suit in the action in which it had proceeded directly against Corvan but had had to put it on hold on account of the liquidation.

In terms of s 318 of the Act the court has a wide discretion to declare culpable directors "***… personally responsible, without limitation of liability, for all or any of the debts or other liabilities of the company as the court may direct***."

At trial none of the parties devoted any attention to quantum. They were wholly focused on the question of liability. Furthermore, very little attention was paid to the liquidation proceedings in which the plaintiff's claim had been provisionally accepted at US$55 990.

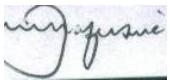
From the plaintiff's declaration I gathered that its main claim was one for damages, the quantum being the value of the same quantity of fish as delivered to Corvan but calculated at the time of the summons. The cost of that fish as at October 2012 when they were delivered was US$53 690. The damages claim was predicated on a finding of fraud against the defendants. Having found against the plaintiff on that score, it follows that its main claim falls away. At any rate, the damages were simply not proved as nobody paid any attention to quantum.

In the final analysis, judgment is hereby granted with costs in favour of the plaintiff and against the defendants jointly and severally, the one paying the other to be absolved, in the sum of US$53 690-00, together with interest on that amount at the prescribed rate from 30 October 2012 to the date of payment. In addition, the defendants shall jointly and severally pay the plaintiff's costs of suit in the plaintiff's action against Corvan Enterprises (Private)

[18] HH179-13

Limited under the case reference number HC54/13. However, it is directed that the liability of the defendants herein shall only be in respect of such amounts as shall remain outstanding after such payments, if any, as may be received by the plaintiff in the liquidation proceedings.

3 December 2014



*Kevin J Arnott,* plaintiff's legal practitioners
*Kantor & Immerman*, defendants' legal practitioners