

SOUTH AFRICA / JUDGMENT

Badenhorst v De Kock (13372/2023) [2024] ZAWCHC 427; [2025] 1 All SA 597 (WCC); 2025 (4) SA 540 (WCC) (18 December 2024) [2024] ZAWCHC 427

COURT

Western Cape High Court, Cape Town

BEFORE

M W Janisch

CASE / FILE NUMBER

13372/2023

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FLYNOTES:

COMPANY – Director – Liability
– Respondent
the sole director of investment holding company – Purchased
shares and loan accounts from applicant –
Company failed to
pay even a quarter of amount owed – Liquidation order
obtained – Respondent took unjustifiable
risk on behalf of
company – Acted at least grossly negligently –
Circumstances indicative of reckless trading
– Respondent
personally liable for the debt owed by company – Companies
Act 71 of 1973, s 424.
IN
THE HIGH COURT OF SOUTH AFRICA
WESTERN
CAPE DIVISION, CAPE TOWN
Case
Number: 13372/2023
In

the matter between:

MARIANA
BADENHORST
Applicant
and
JACOBUS
FRANCOIS DE
KOCK
Respondent

JUDGMENT

JANISCH AJ:

Introduction

1. This case is a good illustration of the pitfalls of doing business with members of one's own family.

2. The Applicant and the Respondent are sister and brother. The

Respondent was the sole director and shareholder of an investment holding company called Good Hope Holdings (Pty) Limited ("GHH"). In November 2015, GHH, represented by the Respondent, purchased shares and loan accounts from the Applicant. Payment of the purchase price was to be made in instalments over a period of two years. Notwithstanding an interim settlement agreement and two court orders, GHH failed to pay even a quarter of the amount owed to the Applicant. On 25 January 2022, the Applicant obtained a final liquidation order in respect of GHH. The winding-up process of GHH is ongoing.

3. The Applicant now approaches this Court in terms of section 424 of the Companies Act 71 of 1973 ("the 1973 Act"), which section continues in force pursuant to item 9 of Schedule 5 to the Companies Act 71 of 2008 ("the 2008 Act"), for an order that the Respondent is personally responsible for the debt of GHH.

4. The quantum claimed by the Applicant is R9,285,000 plus interest. She however asks the court to make provision for the effective reduction of that amount commensurate with any dividend that the Applicant may receive in the winding-up of GHH.

5. The Respondent disputes his liability under section 424, as well as the quantum of the debt if any liability is held to exist. The parties have however agreed on the formulation of the relief, should I be inclined to grant it.

Application proceedings

6. The Applicant seeks final orders on motion. To succeed, she must establish her case on the basis of the facts put up by the Respondent, together with those facts averred by her that the Respondent cannot deny. The factual version put up by the Respondent will only be disregarded if, exceptionally, it can safely be rejected on the papers alone (*Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984

(3) SA 623 (A), *Media 24 Books (Pty) Limited v Oxford University Press Southern Africa (Pty) Limited* 2017

(2) SA 1 (SCA) in para [36]).

7. Although courts are enjoined to take a robust and common-sense

approach towards disputes of fact on motion, and not to hesitate to decide an issue on affidavit merely because it may be difficult to do so (*Soffiantini v Mould* 1956 (4) SA 150 (E) at 154G-H), this approach should be adopted with caution and having regard to the potential for viva voce evidence to alter the court's view of the facts (*Canton Trading 17 (Pty) Limited t/a Cube Architects v Hattingh* NO 2022 (4) SA 420 (SCA) in paragraph [78]).

8. In the present case, the Applicant was content to argue the matter on the papers and did not seek leave to refer any aspects to oral evidence.

The material facts and disputes

The Applicant's investment in Bunker Hills

9. In or about 2009, the Applicant, with capital to invest from the sale of a property, purchased a minority interest in a company called Bunker Hills Investments 378 (Pty) Limited ("Bunker Hills") for R1 million. Bunker Hills' main asset was a quarrying business ("Elsana Quarry").
10. The Applicant contends that the Respondent advised her to invest in Elsana Quarry (on the basis that this carried virtually no risk and good revenue growth) rather than in foreign "tech shares" as had been her plan. She took that advice. The Respondent denies that he so advised her, and says that he merely mentioned the investment opportunity to her, which she took up. This contradicts an email sent by him (attached to the replying affidavit) where he expresses a degree of responsibility "vir die belegging wat ek aanbeveel het".
11. The Applicant contends that during the following years, certain things (which are not explained) came to light that "caused [her] to lose trust in the [Elsana Quarry] business and in [her] brother". She felt that she had missed out on the growth that she would have realised had she rather invested the money in tech shares as she had wanted to do. The Respondent, she says, eventually offered to buy her Bunker Hills shares.
12. The Respondent says that what gave rise to the Applicant's decision to sell her Bunker Hills shares was partly "a family feud, which had been triggered by a fallout between the Applicant and [the Respondent's] wife." He says that the subsequent acrimony escalated to the point where eventually (after the sale agreement was concluded, it seems) the Applicant severed ties with the Respondent and his wife.

Terms of the sale agreement

13. Discussions about the sale of the Bunker Hills shares by the Applicant to GHH commenced. The Respondent says that he (in his capacity as director of GHH) offered to buy the shares because this "presented a good investment opportunity for [GHH]". This conflicts with other evidence given by him in an insolvency enquiry, as discussed below.

14. The parties agreed upon a price of R4,625,000 for the shares. It is common cause that the price was based on the putative value the Applicant would have had as at November 2014 if she had invested her original R1 million in the JSE all share index instead of the Bunker Hills shares. Other amounts contributing to the price were a loan account and an “outstanding management fee” owed to the Applicant, escalated at a notional interest rate.
15. The Applicant says that during the negotiations she expressed a wish to receive the full purchase price immediately. However, the Respondent “advised that GHH would not be able to pay the amount in full on the date of the sale, but would pay capital growth in order to place [her] financially in the same position [she] would have been in if [she] had invested the full purchase consideration in a shares portfolio at the time of the sale.” A capital growth clause was ultimately included in the agreement, as I point out below.
16. On 9 November 2015, the Applicant and GHH (represented by the Respondent) entered into a written agreement for the sale of the Bunker Hills shares and loan account to GHH.
17. The purchase price was R4,625,000. The parties agreed as follows regarding the payment of this amount:

“The Balance of the Price will be paid in monthly instalments over a period not exceeding 24 months. Such instalments will not be less than R100 000 during the first 12 month period. After 12 months these instalments will be increased to a minimum value of R250 000 per month until the balance of the price is paid. If there is still an outstanding amount due at the end of this term this will be paid in full in month 24.”

The Price will accrue capital growth of R750 000 ... per annum if not settled on or before the 31st December of 2015.”

18. The Applicant explains that the agreement to make payment over 24 months was entered into “as respondent advised that GHH did not have the funds to pay the amount in full at the time of the sale of shares.” She however goes on to state that at the time of the sale agreement, the Respondent “never mentioned that there was any risk in respect of the payment of the full amount within the 24 month period and the intention was actually that it would be paid in a shorter period. He certainly never mentioned that the payment was subject to the success of any other business transaction”.
19. The Respondent’s case on this issue is different. He says the following:

“... I did not only advise the Applicant that [GHH] would not be able to pay the full purchase price immediately, but I also explained the reasons why [GHH] would not be able to make this payment. I explained to the Applicant that [GHH] was an investment company and that it would have to realise one of its investments in order to pay the purchase price, and that [GHH] required time to do so.”

20. The Respondent contends that the Applicant understood and appreciated GHH's inability to pay the purchase price immediately, but insisted on compensation for this by way of adjustments to the purchase price – hence the annual R750,000 capital growth amount that was agreed upon.

GHH's default in payment

21. Almost from the very beginning, GHH failed to meet its payment obligations to the Applicant. The Respondent explains the reasons as follows:

“The capital which [GHH] intended to employ in order to pay the purchase price in terms of the sale of shares agreement, was indirectly invested in Safety Protective Clothing (Pty) Ltd. Safety Protective Clothing was an existing business which distributed, as the name indicates, protective clothing. It was a profitable business with the potential for growth.

[GHH] had a loan account with Two Ships Trading 312 (Pty) Ltd (“Two Ships”), and Two Ships held 60% shares and a loan account in Safety Protective Clothing. Safety Protective Clothing was involved in a joint venture with another company, and required capital to fund stock, for a tender which had been awarded to it by Eskom. Unfortunately, the venture partner received all funds from Eskom and failed to make any payment to Safety Protective Clothing. As a consequence Safety Protective Clothing faced a substantial financial predicament, because it was unable to pay its suppliers or repay the Two Ships loan account, as it intended to do. As a further consequence of this development, Two Ships could also not repay its loan account to [GHH]. The cumulative effect of these events was that [GHH] was unable to realise an investment of approximately R10 million, which would have been utilised to pay the purchase price of the shares and loan account it had purchased from the Applicant”.

22. As the above foreshadows, GHH did not come close to meeting its payment obligations under the sale agreement. During the 24-month period in which the entire purchase price was supposed to be paid, and despite two court orders, GHH paid only R590,000 in five erratic instalments. This left R4,035,000 outstanding.
23. Because the total amount had not been settled by 31 December 2015, according to the payment provisions “capital growth” of R750,000 would have accrued to the purchase price on that date, and each year thereafter. The Applicant contends that the total amount of capital growth that had so accumulated by 31 December 2021 was R5,250,000.
24. Together, the Applicant therefore claims that GHH's indebtedness to her currently amounts to R9,285,000, and remains unpaid notwithstanding demand.
25. The Respondent contends that GHH's inability to comply with its obligations was “unforeseen and explained to the Applicant” and that she “understood and appreciated why [GHH] was unable, temporarily, to comply with its obligations”.

The settlement agreement and the first Court order

26. The Applicant did not sit idle when GHH went into default on its payments to her. On 16 May 2016, she instituted an action in this court to claim payment of the outstanding instalments in terms of the agreement. She then applied for summary judgment, whereafter the matter was settled (with the settlement agreement being made an order of court) on the basis that GHH would pay R100,000 by 22 July 2016 and two further amounts of R300,000 each by 7 September and 7 November 2016 respectively. This was over and above the monthly instalments still owing under the agreement, which GHH had to continue paying.
27. Clause 4 of the settlement agreement – essentially an acceleration clause – provides as follows:
- “The entire amount still outstanding in terms of the agreement will become due and payable immediately, in the event of [GHH] failing to pay any instalment timeously.”*
28. By the time the settlement agreement was concluded, the Respondent was apparently already aware of the events involving Safety Protective Clothing (“Safepro”), and does not suggest that he thought that this would be a source of payment. However, he says that at around that time, a property owned by GHH in the vicinity of Clanwilliam Dam was being expropriated and would realise just shy of R1,3 million. The Respondent says that he had every reason to believe that the money that GHH would be paid from this investment “could be utilised to comply with the terms of the settlement agreement, until such time as [GHH] would have realised another investment, in order to pay the balance of the debt owed to the Applicant”.
29. The Clanwilliam payment however never materialised.
30. GHH failed to comply with the settlement agreement that had been made an order of Court. It only made two payments of R100,000 each, in July and September 2016 respectively.

The McCurdie AJ order and subsequent correspondence

31. The Applicant returned to Court to obtain an urgent order enforcing the settlement agreement. The application appears to have been unopposed. On 25 October 2016, the following order was made by McCurdie AJ:
- “That Respondent is directed to comply with the Provisions of the deed of settlement made an order of Court under case no 8210/16 by paying the applicant the sum of R4 225 000.00 (four million two hundred and twenty five thousand rand) plus interest at the prescribed rate of legal interest a tempore morae.”*
32. The issue of the abovementioned court order did not much assist the Applicant. The only further payments made by GHH thereafter were R100,000 on 4 May 2017 and R90,000 on 2 November 2017.

33. The Applicant contended that the Respondent is “by all accounts a wealthy individual and a businessman of repute,” and has “over many years ... deliberately delayed making payment to me and has strung me along”.
34. In support of this, the Applicant attached an e-mail trail between her and the Respondent between February 2017 and July 2018 relating inter alia to the payment of the purchase price for the shares. She summarises this correspondence as reflecting that the Respondent never denied GHH’s indebtedness to her, but “made excuses for GHH’s failure to pay”. This appears to be a fair reflection of the import of the email trail.
35. The Respondent denies any deliberate delay in payment and denies “stringing [the Applicant] along”. He says that “due to unforeseen circumstances, [GHH’s] financial position was such that it was unable to fully comply with the terms of the ... court order.”
36. The Respondent goes on to say that the Applicant know that GHH was an investment holding company with “solid investments” in different businesses “which [GHH] would, given sufficient time, be able to realise”.

Demand, liquidation and the insolvency enquiry

37. From the end of the abovementioned e-mail trail, there is a three-year gap in the narrative until 27 July 2021. On that day, the Applicant’s attorneys issued a letter of demand to GHH. The letter stated that GHH remained indebted to the Applicant in the sum of R4,035,000 in respect of capital together with interest thereon “as well as penalties”. Unless payment, or a payment plan and security, was received by 3 August 2021, they said, “the necessary legal proceedings to protect our client’s interests” would be taken.
38. The letter of demand was not responded to, and no further payment was received. The Applicant states that “due to GHH’s failure to pay me in accordance with the agreement and in compliance with the court order”, she launched liquidation proceedings against GHH. A provisional liquidation order was made on 7 September 2021 and a final order on 25 January 2022.
39. The liquidators of GHH caused an enquiry in terms of section 415 of the 1973 Act to be convened. The Respondent, as its sole director, was subpoenaed to testify. He was examined on a range of topics. A transcript of his evidence at the enquiry was included in the application papers. The Respondent accepted that this could be admitted as evidence in the present proceedings in terms of section 3(1) of the Law of Evidence Amendment Act 45 of 1988.
40. The following aspects of the Respondent’s evidence are relevant.
41. First, the Respondent testified that GHH is an investment holding company that does not trade. It holds assets and loan accounts in a number of companies. At the time of concluding the agreement for GHH to purchase the shares from the Applicant, he was “working on liquidating a loan account that was owed to [GHH] and I was under the impression that

[GHH] should receive that loan account in the foreseeable future”. He then said that repayment (of the loan account) “didn’t happen, and ultimately never happened”. GHH lost in the order of R10 million, which changed its position to the point where it could not pay the Applicant.

42. The Respondent stated later that GHH “doesn’t have income. It has only assets in terms of loan accounts it [lent] to other companies and its ability to pay its own liabilities is as strong as its ability to collect those loan accounts”.
43. Second, the Respondent stated that “every time” he made an agreement (i.e. an agreement to pay the Applicant), he “went to the underlying companies and I put them on terms and asked them for repayment of [GHH’s] loan accounts which they undertook to do as and when they were able to in terms of their own cash flows. So these things just never happened. We went through a difficult financial period in that time. We went through a Covid period subsequently. So there were always external reasons why [GHH] couldn’t collect its debts owed to [it] and therefore couldn’t pay [the Applicant]”.
44. Later, the Respondent testified that over time GHH would be in a position to collect on its loan accounts and repay the debt, but that “the nature of [GHH’s] business was just never such that it could repay her”.
45. Third, although in his answering affidavit the Respondent says that the Bunker Hills shares were good investments, in the enquiry he said that the shares were “worth nothing” and that the company “to this day is still worth nothing”. He testified that owing to the family tension caused by the lack of value in the company, he said to her: “Come up with a number. [GHH] is standing to receive R10 million in a loan account shortly. I’ll pay you out. She came up with a number, I signed an agreement in good faith with her, full well knowing her and me that the shares are worthless. They’re still worthless to this day and I settled her with an amount.”
46. In his answering affidavit, the Respondent sought to explain this evidence by saying that the Bunker Hills shares are worthless to third parties, but valuable to GHH.
47. Fourth, the Respondent admitted that from 2016 GHH could not pay its creditors as the relevant debts fell due. He also admitted that GHH preferred some creditors over others in that it made payments to other creditors despite being indebted to the Applicant. He acknowledged that GHH was trading in insolvent circumstances, and that he knew he should not do so, but should rather commence business rescue or close GHH down.
48. Following the enquiry, an agreement was reached between the liquidators of GHH and the Respondent (representing a subsidiary of GHH, Interactive Signs, according to the Respondent) for the purchase by him of GHH’s shareholding in Two Ships for R3 million. He also bought from the liquidators a vehicle (a Porsche sports car) which he says was an investment for GHH.

49. By the date of argument, the liquidators of GHH had not yet determined the dividend payable to creditors, and no liquidation and distribution account had yet been approved.

The Applicant's contentions

50. The Applicant contends in her founding affidavit that the business of GHH was at all relevant times carried on recklessly by the Respondent, and that he was knowingly a party to this as envisaged in section 424 of the 1973 Act.

51. More particularly, she contends that as the sole director of GHH:

- 51.1. he (i.e. GHH) entered into the sale agreement and caused GHH to take

delivery of the Bunker Hills shares and loan accounts when he knew, or when a reasonable businessman in his position would have known, that GHH did not have the financial resources or ability to pay the purchase price;

- 51.2. he (i.e. GHH) entered into a deed of settlement when there was no reasonable prospect of GHH being able to comply with its terms;

- 51.3. he (i.e. GHH) traded in insolvent circumstances and preferred other creditors over the Applicant, and notwithstanding the order of Court not only failed to comply with the order but paid other creditors

instead of the Applicant under the order;

- 51.4. the liabilities of GHH at all relevant times exceeded its assets, which assets, insofar as they consisted of loan accounts, were subordinated and therefore of no real value;

- 51.5. he (i.e. GHH) did not adopt a resolution under section 129 of the 2008 Act (i.e. for the voluntary commencement of business rescue proceedings) and did not deliver a notice to affected persons setting

out the criteria referred to in section 128(1)(f) of the 2008 Act (i.e. the definition of "financially distressed" for purposes of the business rescue provisions) or the reasons for not adopting a section 129 resolution, but untruthfully certified in the annual financial statements that GHH was able to continue as a going concern, whereas in truth it did not possess assets or conduct a business from which it could pay its debts as they fell due; and

- 51.6. he (i.e. GHH) provided security to unsecured creditors by way of cessions while failing to make payment to the Applicant, and purchased luxury vehicles for his own personal use and enjoyment.

52. On those grounds, the Applicant contended that the Respondent should be declared personally responsible for the debts of GHH.

The Respondent's defences

53. The Respondent's defences fall in two main categories.

54. The first defence goes to quantum. He contends that the Applicant's claim against him is excessive. This pertains to the "capital growth" portion of the claim (i.e. R750,000 per year that the debt is not repaid). Essentially, he argues that the Applicant is not entitled to claim this amount, but only the amount that was ultimately concretised in the order made by McCurdie AJ.
55. In amplification, the Respondent argues first that the Applicant waived any right she may have had to claim the capital growth portion, and that this was demonstrated inter alia by her not claiming this amount in any of the interim litigation. Second, he argues that the order of McCurdie AJ constituted a novation of the sale of shares agreement, thereby extinguishing GHH's obligations under that agreement.
56. The Respondent's second defence goes to the merits. He denies that he carried on the business of GHH recklessly. He says that GHH's operations involved making investments in subsidiaries, funded by way of loan accounts, with GHH becoming involved in those businesses in a strategic and advisory capacity in exchange for a management fee. The idea was for those subsidiaries' businesses to succeed and repay their loan accounts. "[GHH] would in turn utilise the proceeds of these loans, to repay its own investors/creditors".
57. The Respondent contends that GHH was not factually insolvent. He says that its assets far exceeded its liabilities. But "due to the nature of [GHH's] business ... it was not always able to make payments in respect of loans it had received from investors, as such payments fell due. I emphasise that at all relevant times any non-payment in respect of such debt would be restructured with a particular creditor, with the knowledge, co-operation and consent of all [GHH's] other creditors, except for the Applicant".
58. As regards the agreement with the Applicant, the Respondent says that the intention was to liquidate the investment in Safepro (through the realisation of loan accounts) to pay the purchase price within the agreed time frames. The events that eventually precluded GHH from doing so were said to be "wholly unforeseeable".
59. The Respondent denies that it was unlikely that GHH would be unable to pay all of its debts as they became due and payable within the immediately ensuing 6 months. This was because of the support of GHH's creditors "in addressing the temporary cashflow constraints that [GHH] experienced from time to time", and that this aspect of the business "was always managed with the knowledge, co-operation and consent of all the creditors, except for the Applicant".

Merits of the section 424(1) claim

60. I deal first with the merits of the Applicant's claim – i.e. whether the Respondent is to be declared personally responsible for any debts of GHH. Only if the answer to that is in the affirmative does the quantum of the claim arise for consideration.

Legal principles

61. Section 424(1) provides as follows:

“When it appears, whether it be in a winding-up, judicial management or otherwise, that any business of the company was or is being carried on 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 the application of the Master, the liquidator, the judicial manager, any creditor or member or contributory of the company, declare that any person who was knowingly a party to the carrying on of the business in the manner aforesaid, shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court may direct.”

62. In *Ebrahim v Airport Cold Storage (Pty) Limited* [2008] ZASCA 113; 2008

(6) SA 585 (SCA) in paragraph [15], Cameron JA said this about the policy considerations behind section 64 of the Close Corporations Act (which he had earlier stated to be “for all intents and purposes identical to s 424 of the Companies Act 61 of 1973, at least as far as the underlying philosophy is concerned”):

“...it is an apposite truism that close corporations and companies are imbued with identity only by virtue of statute. In this sense their separate existence remains a figment of law, liable to be curtailed or withdrawn when the objects of their creation are abused or thwarted. The section retracts the fundamental attribute of corporate personality, namely separate legal existence, with its corollary of autonomous and independent liability for debts, when the level of mismanagement of the corporation's affairs exceeds the merely inept or incompetent and becomes heedlessly gross or dishonest. The provision in effect exacts a quid pro quo: for the benefit of immunity from liability for its debts, those running the corporation

may not use its formal identity to incur obligations recklessly, grossly negligently or fraudulently. If they do, they risk being made personally liable.” (my underlining)

63. Section 424 reserves its application for those who were “knowingly a party to the carrying on of the business as aforesaid”. In *Howard v Herrigel and Another NNO* [1991] ZASCA 7; 1991 (2) SA 660 (A) at 672H-674A, it was held that what must be established is the director's knowledge of the facts from which the conclusion can properly be drawn that the business was carried on recklessly. It is not necessary to show knowledge of the legal consequences of those

facts.

64. Put differently, as held in *Philotex (Pty) v Snyman, Braitex (Pty) Ltd v Snyman* [1997] ZASCA 92; 1998 (2) SA 138 (SCA) at 143B, “knowingly does not necessarily mean consciousness of recklessness”.

65. The judgment of Howie JA in *Philotex* (supra) provides valuable guidance in summarising the legal principles relevant to a section 424 claim.

66. As regards the test for recklessness, Howie JA first referred (at 143C–E) to judicial formulations such as that “recklessly’ means ‘grossly careless’” and that recklessness is “gross carelessness – the doing of something which in fact involves a risk, whether the doer realises it or not; and the risk being such, having regard to all the circumstances, that the taking of that risk would be described as ‘reckless’”.
67. Having regard to these definitions, Howie JA stated (at 143G–I) that the test for recklessness “is objective insofar as the defendant’s actions are measured against the standard of conduct of the notional reasonable person and it is subjective insofar as one has to postulate that notional being as belonging to the same group or class as the defendant, moving in the same spheres and having the same knowledge or means to knowledge”.
68. The learned Judge went on to say the following (at 144A–C):
- “In its ordinary meaning, therefore, ‘recklessly’ does not connote mere negligence but at the very least gross negligence and nothing in s 424 warrants the word’s being given anything other than its ordinary meaning.”*

In the application of the recklessness test to the evidence before it a Court should have regard, inter alia, to the scope of operations of the company, the role, functions and powers of the directors, the amount of the debts, the extent of the company’s financial difficulties and the prospects, if any, of recovery ...”

69. Applying the test to section 424, the Court in *Philotex* endorsed the following dictum of Van Deventer J in *Ozinsky NO v Lloyd* 1992
- (3) SA 396 (C) at 414G–H:
- “If a company continues to carry on business and to incur debts when, in the opinion of reasonable businessmen, standing in the shoes of the directors, there would be no reasonable prospect of the creditors receiving payment when due, it will in general be a proper inference that the business is being carried on recklessly.”*
70. It is of course important not to apply section 424(1) in a manner that renders it impossible for company directors to take entrepreneurial risk in carrying on the business of a company. Howie JA sought to draw the line in the following way (at 146H–147D):
- “Participation in business necessarily involves taking entrepreneurial risks but s 424 only penalises the subjection of third parties to risk where (apart from the case of fraudulent trading) it is grossly unreasonable. If, therefore, in a given case there is some ground for thinking that creditors will be paid but a reasonable businessman would nonetheless, because of circumstances creating a material but not high risk of non-payment, refrain from running that risk, the director who does run that risk by incurring credit, and thus falls short of the standard of conduct of the reasonable businessman, trades unreasonably and therefore negligently vis-à-vis*

creditors. That departure from the reasonable standard could not fairly be described as gross, however, and the director concerned

would not be hit by the section. By contrast, an instance that manifestly would fall foul of the section is where the reasonable

businessman would realise that in all the circumstances payment would not be made when due. To incur credit in that situation would, as a matter of degree, be so plainly more serious a departure from the required standard than the conduct in the first example that one has no difficulty categorising it as grossly unreasonable and therefore grossly negligent. This second example, one must emphasise, is an extreme one and it would, in my view, impose an unduly heavy burden on a plaintiff in s 424 proceedings to require proof of circumstances in which a reasonable businessman would assess non-payment as a virtual certainty. So, if a plaintiff were to present evidence warranting the conclusion that when credit was incurred there was, objectively regarded, a very strong chance, falling short of a virtual certainty, that creditors would not be paid, that case would, I think, also involve the mischief which the section was intended to combat. It is not possible to attempt to draw the line between negligence and recklessness more exactly. Each case must turn on its own facts and involve a value judgment on those facts.” (my underlining)

71. In the same context, the Respondent relied on the following dictum from an unreported English judgment of Buckley J in *Re White and Osmond (Parkstone) Ltd* (30 June 1960, ChD):

'In my judgment, there is nothing wrong in the fact that directors incur credit at a time when, to their knowledge, the company is not able to meet all its liabilities as they fall due. What is manifestly wrong is if directors allow a company to incur credit at a time when the business is being carried on in such circumstances that it is clear that the company will never be able to satisfy its creditors. However, there is nothing to say that directors who genuinely believe that the clouds will roll away and the sunshine of prosperity will shine upon them again and disperse the fog of their depression are not entitled to incur credit to help them to get over the bad time.'

72. In *Philotex*, the Court also referred to that dictum, but immediately warned against treating it as a licence for optimistic directors to escape liability for reckless conduct. Howie

JA said the following (at 147H–148E):

“Three points need to be made about that statement. The first is that when it was relied on by counsel for the appellant in R v Grantham ..., the Court of Appeal said this of it (at 682G–683A (QB) and 170d–e (All ER)):

'We have been fortunate enough to run to earth a transcript of the whole of that judgment. The Judge eventually decided in favour of the trader on the basis that, although he might have been guilty of insufficient care and supervision of his business, he could not be said, in the words of Maugham J, to have been guilty of real moral blame so as to justify the Judge in saying that he ought to be liable for the debts of the company without limit. In other words, he acquitted the trader of dishonesty – an essential ingredient to liability. Insofar as Buckley J was saying that it is

never dishonest or fraudulent for directors to incur credit at a time when, to their knowledge, the company is not able to meet all its liabilities as they fall due, we would respectfully disagree.'

Quite clearly the proposition contained in the first sentence in the statement of Buckley J was too widely stated and was rightly rejected by the Court of Appeal. ...

The second point, and again concerning the proposition in the first sentence, is that it gives carte blanche to trading while commercially insolvent. When one remembers that a company's inability to pay its debts as they fall due, and despite its technical solvency, may result in its liquidation at the instance of creditors, this is indeed an extraordinary proposition. The third point is that even had Buckley J's statement been good law it had to do with fraudulent trading, as did that part of the judgment in Carbon Developments in which Buckley J was quoted. They did not have to do with reckless trading. ... Consequently, the genuine belief referred to in the third sentence would, for reasons already advanced, not avail if objective considerations nonetheless established recklessness.

It follows, in my view, that the Court below was wrong in relying on the statement of Buckley J in assessing whether recklessness was proved in the instant case."

73. In summary, the incurral of debts on behalf of a company at a time when no reasonable business person would consider that the company would be able to satisfy those debts when they fall due would prima facie demonstrate reckless trading even if the directors bona fide thought otherwise.
74. In finding that the directors in Philotex were personally liable, the Court concluded that the directors were "gambling with trade creditors' money" in continuing to trade. There was no reasonable prospect of the payment of the company's debts when due. The court held that the facts demonstrated "an attitude of such disregard for the fair, frank and reasonable dealing with outsiders which [the company's] insolvent circumstances demanded that, in my view, it was reckless" (at 186A-B), and that "[n]ot only was there in all these circumstances no reasonable prospect of payment of all [the company's] debts when due but the most acceptable inference is that there was on the part of [the company's] directors ... an awareness that trade creditors' money was being unreasonably risked and ... a wilful disregard of the consequences of trade creditors" (at 186D-E).
75. In *Anderson v Dickson and Another NNO (Intermenua (Pty) Ltd Intervening)* 1985
(1) SA 93 (N) at 110G, Booysen J approved of the following passage in Henochsberg on the Companies Act 3 ed at 74:
"(T)he carrying on of any business of a company recklessly means carrying it on by actions which evince a lack of any genuine concern for its prosperity."
76. In *Gordon NO and Rennie NO v Standard Merchant Bank Ltd* 1984 (2) SA 519 (C), it was held that section 424 can apply in relation to a single reckless transaction and does not necessarily envisage a continued course of conduct. De Kock J stated as follows (at 527A-E):

“When one looks at the wording of the section one is immediately struck by the wide terms in which it is cast. The section applies where it appears that any business of the company was or is being ‘carried on’ in a reckless or fraudulent manner. ... The object of the provision is clearly to enable creditors and ultimately the Court to exercise a restraining influence on over-sanguine directors and to bring reckless and fraudulent persons to book. ... [T]he provisions of s424 are intended to provide a meaningful remedy against the abuses contemplated by the Legislature and the Court should, I consider, give the words of the section their full breadth.”

77. A consequence of giving the words of the section their full breadth is that a director can be held personally responsible for the debts of the company without there necessarily being proof of a causal link

between his or her conduct and those particular debts (Howard v Herrigel (supra) at 672E).

78. Counsel for the Respondent however relied on Saincic v Industro-Clean (Pty) Limited 2009 (1) SA 538 (SCA) in support of the submission that where there was no proven link between the debt owed to the creditor and the reckless conduct complained of, this is a relevant factor to take into account in deciding whether a section 424 declaration is fair and equitable. In my view, that is indeed the import of the judgments in Saincic. Harms JA gave the example of proved reckless conduct that had occurred in the past, but a debt on which the creditor bases its claim arose at a time when the company was being properly operated. In such a case, the court would be loath to punish the directors through a declaration of personal liability in relation to the current debt.
79. Conversely, in my view, the closer the link between the debt and the reckless conduct, the more likely the court is to exercise the discretion in relation to that debt.

The section 424(1) claim: application to the facts

80. I now turn to apply the above legal principles to the facts of the present case.
81. Because the Respondent was at all relevant times the sole director of GHH, there is no dispute that he was the only person to whom the conduct of the business of GHH could be attributed. No third parties were involved. Whatever GHH did, it did through him.
82. Moreover, the Respondent did not contend that he was not “knowingly” a party to everything that GHH did. As I understood the answering affidavit and his evidence at the insolvency enquiry, the Respondent knew of and takes personal responsibility for every action of GHH, although he denies that his conduct in this regard was reckless.
83. The primary question is whether, on the facts revealed by the affidavits in a claim for final relief, the Respondent caused the business to be carried on recklessly. If so, a second question will arise as to whether it is just and equitable to make a declaration of personal responsibility for any debt of GHH. Issues of causation will

play a role in that decision.

84. In my analysis of the evidence, I focus on three areas:

84.1. First, the conclusion of the sale of shares agreement and the associated incurral of indebtedness by GHH to the Applicant;

84.2. Second, the conclusion of the settlement agreement; and

84.3. Third, the general manner in which the Respondent carried on the business of GHH over the period relevant to this application.

The sale of shares agreement

85. The Applicant contends that the Respondent's act in causing GHH to enter into the contract to acquire the Bunker Hills shares from her on the agreed payment terms constituted reckless conduct.

86. Both parties understood that GHH was not in a position to pay the full purchase price of R4,625,000 immediately. It was for this reason that payment terms over two years were concluded.

87. The key question is however whether a reasonable business person in the position of the Respondent would have assumed this debt and the instalment payment obligations on behalf of GHH, having regard to GHH's ability to meet those payment terms.

88. It is clear that GHH was in fact not in a position to meet the obligations undertaken on its behalf by the Respondent. It failed almost from the outset to make the agreed payments, and ultimately paid less than a quarter of the capital before it was placed in liquidation. The indications are that the liabilities of GHH well exceed the fair value of its assets.

89. The question as to whether the incurral of the indebtedness was reckless must however be decided on the facts and circumstances existing at the time of concluding the sale agreement.

90. In this regard, the Respondent's evidence was that GHH was an investment holding company and that its ability to pay any capital indebtedness was entirely dependent upon its being able to call up loan accounts with its operating subsidiaries. As the Respondent said at the enquiry:

"[GHH] doesn't have income. It has only assets in terms of loan accounts it [lent] to other companies and its ability to pay its own liabilities is as strong as its ability to collect those loan accounts."

91. Although in his answering affidavit the Respondent said that GHH provided strategic and advisory services to subsidiaries in exchange for a management fee, there was no indication that this was a source of income which would play a role in paying any indebtedness arising from the sale of shares agreement.

92. The question then arises as to how the Respondent, as the sole director of GHH, reasoned that GHH would be able to meet the agreed instalments of at least R100,000 per month for the first year and at least R250,000 per month for the second year, with a total payment of R4,625,000 by the end of the second year.
93. The Respondent's evidence in this regard is unsatisfactory.
94. In his answering affidavit, the Respondent states that the "capital" that GHH "intended to employ in order to pay the purchase price" was "indirectly invested" in Safepro. He goes on to say that as a result of Safepro not receiving payment from a joint venture partner, Safepro was unable to fund suppliers or pay its loan account with Two Ships, which in turn was unable to repay its loan account to GHH. This meant that a capital loan account investment of some R10 million "which would have been utilised to pay the purchase price of the shares" could not be realised.
95. There are a number of difficulties with this evidence.
96. First, the event that is relied upon as the basis to render the loan repayment possible is the provision of third-party funding to enable Safepro to acquire trading stock. That seems on the face of it to relate to the funding of the ordinary business operations of Safepro. It is not stated how success in receiving that money and funding its ongoing trade would also have suddenly enabled Safepro to repay a capital shareholder loan in the material sum of R10 million. The position may have been different if, for example, there were evidence of an expectation that Safepro was going to dispose of its business for a capital sum that could be used to repay its loan account with Two Ships, or evidence that it was going to raise fresh capital from another source to enable it to settle its loan account. There was however no evidence of any such expectation.
97. Second, it is not stated how and when the Respondent considered that GHH would in fact receive the funds out of the Two Ships loan account. This is particularly important as he had committed GHH to meeting specified monthly payment obligations, commencing immediately. If the idea was for GHH to pay the instalments out of the proceeds of a R10 million loan account realisation, one would expect the loan repayment to be received before the first instalment, or very soon thereafter. The Respondent however failed to say what the expected timing of any repayment was, which gives the impression that there was no reliable expectation of this.
98. Third, apart from saying that it was "intended" to use the capital from the Safepro investment to pay the purchase price, and that that investment "would have been utilised to pay the purchase price", there is in fact no clear or concrete statement to the effect that the Respondent had a reliable expectation of GHH receiving enough money from the realisation of the investment to enable GHH to pay the instalments timeously.

99. The answering affidavit is therefore unacceptably vague in relation to the crucial question as to how the Respondent considered that GHH would be able to meet its substantial and newly assumed obligations. The court is not given a proper basis to conclude, on the facts, that when the sale-of-shares agreement was entered into, GHH had a

reasonable or reliable expectation of being able to meet its payment obligations to the Applicant as they arose, whether out of the proceeds of the Safepro / Two Ships loan account or at all. On the contrary, it seems that, at best for the Respondent and on his own version, GHH was dependent on the success of Safepro's ongoing operational business, which was in turn dependent on the success of a particular financing transaction that had yet to come to fruition, and that was clearly subject to counterparty risk.

100. In the same vein, the Respondent testified in bald and vague terms as to what caused GHH to be unable to meet its payment obligations. He pinned the blame entirely on the joint venture partner not paying an amount to fund stock purchases by Safepro. However, he did not provide any objective evidence in support of this, such as the defaulting party's name, the terms of the deal, and when the breach occurred – aspects that would clearly have been in his personal knowledge. One would have thought that a calamitous event or breach that rendered Safepro unable to repay a loan account of R10 million would have generated correspondence or legal proceedings that could easily have been produced. The absence of any such corroboratory material casts severe doubt on the reliability of the Respondent's explanation.

101. The Respondent's position is not helped by his evidence under oath at the insolvency enquiry. What he said there was that, at the time of the sale-of-shares agreement, he was "working on liquidating a loan account that was owed to [GHH]" and was "under the impression that [GHH] should receive that loan account in the foreseeable future" (my underlining). This is the language of hope and uncertainty, not that of a director who has any proper or reliable expectation of how his company will meet its newly assumed obligations.

102. The material shortcomings in the Respondent's own version on this point are amplified by the contents of an email written by him on 2 August 2018 which was attached to the replying affidavit. The Respondent did not at any stage suggest, whether by way of a fourth affidavit or in argument, that this email was not penned by him. It was his attempt to explain his position vis-à-vis the GHH debt to his family members.

103. In the email, the Respondent says that at the time of entering into the purchase agreement on behalf of GHH, he was "besig ... om eiendomme in die mark te sit en vertrou op 'n goeie inkomste uit Safepro in die toekoms. Dit sou my die vermoë gee om maandelikese betalings to maak en dan aan die einde van die 2e jaar die balans" (my underlining) (i.e. he was busy putting properties on the market and trusted in a good income from Safepro in the future. This would enable him to make monthly payments and settle the balance at the end of the second year).

104. The clear impression created by this email is that the Respondent was actively marketing properties (plainly to obtain a capital return) and was also expecting that Safepro would provide sufficient income in the future to pay the instalments. What is missing from this account is any suggestion that the purchase price would be funded out of the liquidation (in the “foreseeable future”) of R10 million in capital loan accounts in Safepro and Two Ships, which formed the cornerstone of the Respondent’s version in the answering affidavit.
105. Moreover, in his same email the Respondent says that the problem that arose with Eskom and “bemagtigings vennote” of Safepro meant that “dit het natuurlik nie die maandelikse inkomste waarop ek gereken het ingebring nie”. This again does not tally with his version that the events at Safepro precluded it from settling, in the short term, a R10 million capital loan account with Two Ships.
106. For the reasons given above, the Respondent’s version as to his personal state of mind regarding how GHH would meet its obligations under the sale-of-shares agreement is vague, internally contradictory and bereft of any clear plan or expectation, at the time of concluding the agreement, as to how GHH was going to pay what the agreement required of it.
107. Nothing that the Respondent has said places the court in a position to conclude that, objectively, circumstances existed that would have warranted directors to think that there was a reasonable prospect of the Applicant being paid in accordance with the agreement. The fact that GHH failed abjectly to meet its obligations reinforces the inference that incurring the indebtedness was at least grossly careless in the circumstances.
108. This conclusion is bolstered by the Respondent’s statements under oath at the enquiry, and confirmed in his aforementioned email attached to the replying affidavit, that the Bunker Hills shares that he caused GHH to acquire at considerable expense were worthless.
109. The Respondent testified that Bunker Hills was “worth nothing” at the time; that to avoid family tension he told the Applicant to “come up with a number” for the shares; that they concluded an agreement “full well knowing her and me that the shares were worthless”. In his email referred to above, the Respondent said that “he” bought shares that “he” did not need at a price that made no sense (“aandele by haar te koop wat ek nie nodig het nie, teen ‘n prys wat nie sin maak nie”).
110. An entrepreneurial acquisition of an asset by a company, effectively on credit but where the source of repayment is not secured, is in my view less likely to be viewed as reckless where the asset is of intrinsic value and capable of being liquidated to settle debt in a worst-case scenario. But where the asset is not regarded as having any value at all, the only conclusion is that the company has knowingly assumed a liability without acquiring any corresponding asset. All that has happened is that the company’s financial position has been materially weakened.

111. On the above evidence, the Respondent is saying that, to appease a family member, he caused a company of which he is the sole director to commit itself to making substantial and onerous payments out of a source of funding that was, at best, highly uncertain, in exchange for the acquisition of shares that he knew were worth nothing. No director, acting reasonably, would ever do that. It demonstrates a wanton disregard for the interests of the company and in my view cannot be seen as anything other than reckless.
112. I pointed out above that in his answering affidavit, the Respondent sought to retract his evidence at the enquiry by saying that the shares may be worthless to a third party but were valuable to GHH.
113. I find this explanation inherently unsatisfactory. Commercial assets such as shares are capable of objective valuation. If they are worth nothing to a third party, it is because the underlying business or assets of the company are worthless. That indeed seems to have been the case with the Bunker Hills shares. They cannot somehow regain their value because GHH holds them.
114. As stated, this court in proceedings brought on motion is enjoined to accept the Respondent's version unless there are proper grounds to disregard it. This appears to be a proper case for doing so, at least in relation to the self-serving statements that GHH regarded the shares as valuable assets or a good investment, despite their lack of objective value. Apart from its inherent illogicality, this contention is flatly contradicted by the Respondent's own earlier statements and evidence under oath on precisely the same topic. In the absence of any facts that may justify this extraordinary proposition, I can see no reason to conclude that any director, acting reasonably, would adopt a similar view.
115. In summary, I believe that the inference is justified that in committing GHH to acquire the Bunker Hills shares from the Applicant on the terms agreed, the Respondent was party to the reckless carrying-on of the business of GHH. Not only was this an arrangement that could only be detrimental to GHH (given the lack of value in the shares being acquired), and one that was concluded first and foremost as a means of reducing personal or family tensions rather than to advance the interests of GHH, but the absence of any concrete or reliable expectation at the time that GHH would be able to meet its payment obligations as they arose allows only for the conclusion that the Respondent took an unjustifiable risk on behalf of GHH, and so acted at least grossly negligently. To paraphrase Howie JA in *Philotex* (supra), there was, objectively regarded, a very strong chance, even if falling short of a virtual certainty, that the Applicant would not be paid (as turned out to be the case). This is indicative of reckless trading.

The settlement agreement

116. The second event relevant to the charge of the reckless carrying-on of business by the Respondent is the conclusion of the settlement agreement after GHH first defaulted on its payment obligations.

117. The settlement required GHH to catch up on its missed payments in three instalments of R100,000, R300,000 and R300,000 respectively, while continuing to make the originally agreed payments. Importantly, it also included an accelerated payment of the full outstanding amount in the event of any default.
118. At the time the settlement agreement was entered into, the alleged events involving Safepro and its joint venture partner had occurred, and it would therefore have been clear that no money (whether a capital loan repayment of R10 million or any monthly income) would be forthcoming from the Safepro investment. The Respondent nonetheless committed GHH to even more onerous payment terms for the balance outstanding, and to this being an order of court.
119. The only evidence put up by the Respondent in relation to how he envisaged GHH would meet these obligations was that GHH was awaiting payment for the Clanwilliam property. Even on that version, the amount to be realised (just below R1,3 million) was far below the total debt. There was no indication of any other source of income to pay the balance of the instalments, let alone a source of a large amount of capital if the acceleration clause were to be triggered, as seemed inevitable.
120. The only conclusion that can be drawn is that the Respondent committed GHH to fresh and more onerous payment obligations under the settlement agreement with nothing more than an unformulated hope that GHH might somehow meet the vast majority of its future payment obligations from disposing of other assets.
121. In this, too, I am of the view that the Respondent showed scant regard for the success or well-being of GHH, and incurred debt on its behalf with no reasonable prospect of being able to pay it when it fell due. This meets the requirements of recklessness as discussed in the cases.

The general conduct of GHH's business

122. The above specific examples of what I consider reckless conduct must be viewed in the context of the Respondent's own evidence as to how he carried on GHH's business more generally in the period that it was indebted to the Applicant.
123. As stated, GHH did not have a real operating business but was in substance an investment holding company. Its ability to pay its debts was dependent on it receiving repayments of loan accounts from its operating subsidiaries.
124. The prospects of obtaining loan repayments from subsidiaries were largely outside the Respondent's or GHH's control, as they were dependent on the needs or abilities of the subsidiaries to pay. The inherent uncertainty and lack of control is reflected in the Respondent's own evidence at the enquiry that "every time I made an agreement [to pay a creditor] I went to the underlying companies and I put them on terms and asked them for repayment ... which they undertook to do as and when they were able in terms of their own cashflows" and that "these things just never happened".

125. What this demonstrates is that the Respondent was generally prepared to commit GHH to making payments before even approaching the operating companies for the money it needed to do so, and without knowing whether there was any prospect of success in this regard.
126. Moreover, the Respondent chose not to capitalise his business through equity but by loans that were repayable to creditors on demand (the February 2021 annual financial statements state as follows in respect of long-term loans received: “Die lenings is oversekerd, dra rente soos van tyd tot tyd ooreengekom en geen vaste terme van terugbetaling bestaan nie.”)
127. Given the apparent mismatch between GHH’s obligations to pay creditors from time to time and its unreliable access to funds from subsidiaries’ loan account repayments, it is clear that GHH was at all times dependent upon the goodwill of its loan creditors to continue operating by agreeing extended payment terms, often against further commitments by GHH.
128. This is in fact expressly acknowledged by the Respondent in his answering affidavit where he states that “any non-payment in respect of such debt [i.e. debts to loan creditors] would be restructured with a particular creditor, with the knowledge, co-operation and consent of all [GHH’s] other creditors, except for the Applicant”. Certain payments to other loan creditors of GHH, which the Applicant argued preferred them over her, were stated by the Respondent to be made “pursuant to the temporary restructuring of [their] loans”.
129. The Respondent complains elsewhere that the Applicant knew full well that GHH would “eventually be able to fully comply with its contractual obligations towards [the Applicant]”. The impression is that he expected the Applicant to tolerate GHH’s default in the hope that it would one day be able to pay her what it owed, and to continually extend payment terms accordingly, as other creditors seemed to be prepared to do.
130. In summary, the Respondent’s own evidence was that he had caused GHH to adopt a business model that was dependent, for GHH’s survival, on the goodwill, patience and acquiescence of creditors. As the Applicant stated in reply:
- “If GHH’s business model was as Respondent contends(,) it is unsustainable and unsuccessful and depended on external funding by creditors who were forced into extending payment terms.”*
131. The Respondent also readily conceded at the enquiry that he had allowed GHH to trade in insolvent circumstances since 2016, because it was not possible for GHH to pay its debts as they fell due.
132. I am satisfied that the ongoing conduct of the business of an investment holding company financed by external debt, without any clear plan for settling that debt as it falls due save for the hope and expectation that creditors will simply co-operate and extend payment terms, rather than liquidate a commercially insolvent entity, is reckless in itself. It is not merely the adoption of an acceptable entrepreneurial risk. Taking on substantial new and onerous obligations to the Applicant in these circumstances, including stringent instalment

obligations, but without any enhanced expectation of income, merely compounds this conclusion.

Conclusion on recklessness

133. I have concluded above that both in relation to GHH taking on debt towards the Applicant and generally in relation to the conduct of the GHH business, the Respondent conducted himself in a manner so far removed from how a reasonable director would operate as to justify the conclusion of recklessness.
134. I would add the following observations.
135. The fact that the Respondent chose to use GHH as the vehicle to achieve personal objectives of appeasing the Applicant and soothing family tensions, by taking on an onerous obligation, suggests that he regarded GHH as his personal instrument or alter ego. However, he was not entitled to ignore the interests of GHH or hide behind its corporate personality. As stated in *Ebrahim v Airport Cold Storage (Pty) Limited* (supra) in paragraph [15], section 424 “in effect exacts a quid pro quo: for the benefit of immunity from liability for its debts, those running the corporation may not use its formal identity to incur obligations recklessly, grossly negligently or fraudulently. If they do, they risk being made personally liable.” The Respondent, in my view, did not bring his side of that bargain and cannot expect protection as a result.
136. The overall impression one gets is that, in the words of *Strut Ahead Natal (Pty) Limited v Burns* 2007 (4) SA 600 (D) at 607F–608F, the actions of the Respondent evince a lack of genuine concern on the Respondent’s part for the prosperity of GHH.
137. Where a company incurs debts that it has no reasonable prospect of repaying when due, that in my opinion evidences a lack of any genuine concern for its prosperity, because it puts the company in a position of commercial insolvency and exposes it to being wound up – the very opposite of prosperity.
138. For these reasons, I find that the Applicant has in principle established a basis for relief against the Respondent under section 424.

The quantum of the indebtedness

139. The relief available under section 424 is a declaration of personal responsibility for debts of the company. It is therefore necessary to determine the extent of GHH’s debt to the Applicant.
140. The main issue in relation to quantum is whether the indebtedness of GHH to the Applicant includes the R750,000 per annum “capital growth” portion of the purchase price, as the Applicant contends, or whether it excludes that portion, as the Respondent claims.

141. The facts pertaining to the various attempts by the Applicant to enforce her claim against GHH have been set out above. I nonetheless summarise the key steps that preceded the application:

141.1. The purchase price for the shares was set at R4,625,000, payable in accordance with clause 13.

141.2. Clause 13 required the payment of the purchase price in instalments of at least R100,000 per month in the first 12 months, and at least R250,000 per month in the second 12 months, with the full balance being payable at the end of the period. The price would accrue capital growth of R750,000 per annum if not settled on or before 31 December 2015.

141.3. When GHH defaulted on its payment obligations, the Applicant issued summons in May 2016 claiming the outstanding monthly instalments only, despite the first capital growth amount having vested.

141.4. The litigation was settled by way of a written agreement dated 18 July 2016, which required the payment of the outstanding monthly instalments and the continuation of current instalments. The agreement however introduced a new feature, namely an acceleration clause (which had not been in the sale-of-shares agreement) to the effect that the full amount outstanding in terms of the agreement would be payable immediately in the event of a default on any instalment.

141.5. When GHH again defaulted, the Applicant applied for and obtained an order on 25 October 2016 that GHH must pay the sum of R4,225,000 (i.e. the purchase price less the instalments actually paid to date) plus interest at the prescribed rate *a tempore morae*. There was no mention of the “capital growth” amount being payable.

141.6. The claim for payment that gave rise to the McCurdie AJ order was supported by an affidavit that alleged that the “entire amount still outstanding” was R4,225,000. Judgment in this amount, plus *mora* interest, was claimed.

141.7. The McCurdie AJ order said nothing about a capital-growth amount being payable.

142. It was common cause that the originally agreed capital-growth amount (i.e. R750,000 per annum) was intended to take the place of interest on the purchase price. In other words, the Applicant was to be compensated for any delay in receiving payment of the full amount, not in the form of interest, but through an annual lump sum amount.

143. The settlement agreement introduced an acceleration clause for the capital amount in the event of a breach. If it had not been for that clause, it would not have been possible for the Applicant to obtain the order from McCurdie J for the payment of the full amount, since only 11 months had passed since the original agreement was signed and the maximum liability would have been R1,100,000 at that stage (of which R400,000 had been paid).

144. The order made at the behest of the Applicant by McCurdie AJ was also inconsistent with the original agreement as the former required interest to be paid a tempore morae (which, in context, can only mean from the date on which the accelerated capital portion became payable).
145. The debt that had arisen under the sale-of-shares agreement was in my view therefore overtaken by the terms of the settlement agreement, which was in turn overtaken by the terms of the McCurdie AJ order.
146. The interest component of the order (which remains in force and binding on GHH) plainly serves the same purpose as the “capital growth” component. I cannot see that the terms of the order can co-exist with the original capital-growth obligation.
147. I am in agreement with the argument made by the Respondent that by virtue of how the Applicant conducted herself in relation to the original litigation, the settlement agreement and the McCurdie AJ order, the Applicant waived any right she may have had to pursue the capital-growth component independently of the claim finally encapsulated in the order. At no stage did she seek to enforce payment of the capital-growth portion independently of the purchase price; she originally only sought an order to pay the outstanding instalments, even though the first R750,000 amount had vested; she entered into a settlement agreement that also made no mention of the capital-growth amount, altered the payment arrangements and introduced an acceleration clause; and when there was a default on that agreement, she asked for, and obtained, an order of court based on the settlement agreement, and sought and obtained a judgment for interest that is wholly inconsistent with the continued existence of the capital-growth portion.
148. I therefore conclude that the Applicant did indeed conduct herself in a manner irreconcilable with an intention to claim the capital-growth amounts independently of the outstanding sum and the interest now imposed through the McCurdie AJ order. The proven objective facts allow of no other reasonable hypothesis (cf. *Road Accident Fund v Mothupi* 2000 (4) SA 38 (SCA) in paras [15] to [19]).
149. Moreover, the order of McCurdie AJ, with its provision for the payment of interest on the outstanding capital amount a tempore morae, effectively created a cause of action enforceable by the Applicant against GHH that was new and independent when compared to how the parties had regulated the issues of payment and interest in the sale-of-shares agreement. In that respect at least, it seems to me that the McCurdie AJ order necessarily novated the sale-of-shares agreement (cf. *MV Ivory Tirupati: MV Ivory Tirupati v Badan Urusan Logistik (aka Bulog)* 2003 (3) SA 104 (SCA) in para [31]). This rendered it incompetent for the Applicant to seek to enforce the “capital growth” claim where an entitlement to mora interest on the same amount had been established.
150. In the circumstances, I find that the debt that GHH owed to the Applicant was in effect the debt reflected in the McCurdie AJ order, less any payments made pursuant to that order.

151. The unpaid portion of the debt bears interest at the prescribed rate *a tempore morae*. As I understand the position, GHH paid the first instalment owing under the first court order (based on the settlement agreement) but defaulted on the second instalment by paying only R100,000 of the R300,000 due on 7 September 2016. The acceleration clause then took effect and the entire amount became owing immediately. The *mora* date in respect of the unpaid amount is therefore 7 September 2016.

Exercise of the discretion

152. Where the requirements of section 424 are met, the court retains a discretion as to whether to declare the Respondent to be responsible for any debts of the company, and as to the amount of any such liability.
153. I consider such a declaration to be warranted on the present facts.
154. Since only the Applicant has brought an application for such relief, I cannot make a declaration in relation to any other debt of GHH. At the same time, I see no reason to limit the order to anything less than the amount established to be owed by GHH to the Applicant.
155. The question as to whether a direct causal link has been established between the Respondent's recklessness and the debt in issue is relevant to the exercise of the discretion (cf. *Saincic* (supra)). In my view, the Applicant has shown such a link to exist. In any event, having regard to the general conduct of the GHH business, there is a marked similarity between acquiring the Bunker Hills shares on credit and taking on long-term loans without a reliable plan to meet the indebtedness – other than a hope the creditors will give GHH time to pay. That criticism of the Respondent's business plan applies equally to the assumption by GHH of indebtedness to the Applicant.
156. In the premises, I consider that the Respondent should be declared personally liable for the total indebtedness of GHH to the Applicant.

The order

157. As stated at the outset, the parties have agreed a formulation for the relief sought that takes account of the possibility that the Applicant will receive a portion of what is owing to her by GHH as a dividend in the insolvent estate. I agree that there is no reason why the Applicant should effectively obtain a double benefit in respect of the same debt, and I consider it just that the Respondent's liability should be reduced by the amount of any such payment received.
158. I therefore make the following order:
1. In terms of the provisions of section 424(1) of the Companies Act 61 of 1973 read with item 9 of Schedule 5 to the Companies Act 71 of 2008, it is declared that:
 - 1.1. the Respondent is personally liable for the debt owed by Good Hope Holdings (Pty) Ltd (in liquidation) ("GHH") to the Applicant in the amount of R4 035 000.00 (the "capital amount");

1.2. the Respondent is to pay the Applicant the capital amount plus interest on any outstanding balance from time to time at the prescribed rate from 7 September 2016 to date of payment;

1.3. should any dividend be payable to the Applicant by the liquidators of

GHH pursuant to an approved liquidation and distribution account:

1.3.1. when the capital amount, interest and costs had already been paid in full by the Respondent to the Applicant, then the Applicant shall against receipt of such dividend pay same to the Respondent; or

1.3.2. when any part of the capital amount, interest and costs has not been paid in full, such dividend shall be applied first in payment of the outstanding capital amount, then interest and then costs and the balance (if any) after payment as aforesaid shall be paid by the Applicant to the Respondent.

2. The Respondent is to pay the party and party costs of this application, with allowance of costs of senior counsel, on Scale B as taxed or agreed.

M W JANISCH

Acting Judge of the High Court

Western Cape Division

APPEARANCES:

For the Plaintiff:

L M Olivier SC

Instructed by:

DKVG Attorneys

For the Defendants:

P Viviers SC

Instructed by:

Lucas Dysel Inc

Date of hearing:

12 November 2024

Date of judgment:

18 December 2024

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Prepared on 8 October 2026 · Esheria