

SOUTH AFRICA / JUDGMENT

Currin and Another v Van Zyl NO and Another (A62/2019) [2019] ZAWCHC 98 (7 August 2019)

[2019] ZAWCHC 98

COURT

Western Cape High Court, Cape Town

BEFORE

Binns-Ward, Savage, Papier

CASE / FILE NUMBER

A62/2019

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Republic

of South Africa

IN

THE HIGH COURT OF SOUTH AFRICA

(WESTERN

CAPE DIVISION, CAPE TOWN)

Case

No. A62/2019

Before: The Hon. Mr Justice Binns-Ward

The

Hon. Ms Justice Savage

The

Hon. Mr Justice Papier

Date of hearing: 31 July 2019

Judgment:

7 August 2019

In

the matter between: WESLEY
 AVIANT
 CURRIN First
 Appellant
 RICHARD
 PAUL
 KRONK Second
 Appellant
 and
 THOMAS
 CHRISTOPHER VAN ZYL
 N.O. First
 Respondent
 LEBOGANG MICHAEL MOLOTO
 N.O. Second
 Respondent

JUDGMENT

BINNS-WARD J (Savage and Papier JJ concurring):

[1] The appellants have come on appeal to the full court from the judgment of Vos AJ declaring them personally liable, jointly and severally, in terms of s 424(1) of the Companies Act 61 of 1973, in respect of the indebtedness of Company Worx Group (Pty) Ltd (in liquidation), hereinafter in most instances simply referred to as ‘the company’, to the insolvent estate of Shaun Norman Currin.[1] The appeal is brought with leave granted by the court of first instance.

[2] The proceedings in the court a quo were on motion. The applicants were the co-liquidators of the company. However, the deponent to the principal founding affidavit was the chief executive officer of ORO Africa (Pty) Ltd (‘ORO’). It may readily be deduced from the factual background that I shall relate presently that the proceedings against the appellants were instituted by the liquidators at the instance of ORO. The critical involvement of the CEO of ORO in the litigation embarked

upon by the liquidators signalled clearly that the object of the exercise was to facilitate a recovery by the trustees of Shaun

Currin’s estate of funds that might be applied in redemption of a claim by ORO against the estate. That much was effectively

confirmed in the averment by ORO’s CEO in the founding affidavit to the application by the liquidators in the court a quo

that ‘[t]his matter arises out of a sequestration application in which Shaun Currin was sequestrated by ... “ORO”, ...’.

- [3] The first appellant, who is the brother of Shaun Currin, had been the sole director of the company at the time of its liquidation. The company had been established by Shaun Currin in 2014, and he was its sole director until June 2015, when he was replaced in that capacity by the first appellant. The timing of the first appellant's substitution of his brother as sole director corresponded closely with the timing of Shaun Currin's dismissal from his position at ORO and the institution of the sequestration application. The first appellant did not hold any professional qualifications that were relevant to the services provided by the company or its subsidiaries. [2]
- [4] The second appellant, who is a friend of both of the Currin brothers, was the general manager of the company prior to setting up the same type of business as that of the company in another entity called Cloud CFO (Pty) Ltd of which he is the sole director. He was in the company's employment from November 2014 until May 2016. Cloud CFO (Pty) Ltd, which was incorporated on 9 February 2016, while the second appellant was still employed by the company, was cited as the fourth respondent in the court a quo.
- [5] Shaun Currin had been the chief financial officer of ORO until June 2015. Currin's employment by ORO had ended upon the discovery that he had embezzled 'millions of Rands' from his employer. ORO thereafter applied for Currin's sequestration. Currin, who all along maintained that the allegedly embezzled funds had actually been lent to him by ORO, opposed that application on the basis that he was not insolvent. He averred that the existence of his loan account claim against

Company Worx Group (Pty) Ltd resulted in the value of his assets exceeding that of his liabilities.

- [6] In the sequestration proceedings, ORO questioned the extent of Currin's loan account claim. It was clear, however, that its calculations had not taken into account a component amount of R3,5 million that came to light only later in the exchange of papers in those proceedings.
- [7] The amount of R3,5 million of Currin's reported R4 687 521 loan account claim against the company represented the purchase price payable by the company in respect of the sale to it of Currin's interest in a dormant entity, Growth Accountants CC, and the business of an eponymous 'sole proprietorship' through which Currin, apparently as a side-line to his employment with ORO, had conducted an accounting business that had been established by him as long ago as 2009. The amount was part of a R5 million loan facility extended by Currin to the company in terms of a loan agreement concluded at the same time as

the sale agreement. Shaun Currin executed both of the deeds of agreement as the representative of both the contracting parties.

The loan would be interest bearing at the prime rate and repayable on demand after 1 March 2017, or earlier in the company's

discretion. A significant part of the value given in return for the R3,5 million purchase consideration was said to lie in the company's acquisition of certain intellectual property identified only as 'Mr Currin's Company Worx Online Strategy', the character of which was not described in the answering papers in the sequestration application because of the advantage its disclosure would allegedly give to competitors of the company.

[8] The second appellant, who is an experienced 'financial professional' holding a B. Compt degree and a postgraduate diploma in applied accounting science, made an affidavit, jurat 3 December 2015, in the sequestration proceedings of Shaun Currin in which he opined, and purported to demonstrate, that Currin's loan to the company was recoverable. The company's alleged contractual relationship with a business in

the United Kingdom appears to have played a material role in the second appellant's calculations in this regard.

[9] Shaun Currin was provisionally sequestered on 15 July 2015. His opposition to the confirmation of the provisional order was unsuccessful. The provisional order was made final on 17 December 2015. The appeal court refused an application for leave to appeal against the order on 25 May 2016.

[10] The company was placed into provisional liquidation on 28 February 2017 at the instance of the trustees of Shaun Currin's insolvent estate, it being alleged that it was by that time apparent that it had no assets of any significance and would be unable to settle its indebtedness to Currin's estate. The company gave notice of its intention to oppose the application, but ultimately no opposing papers were delivered. The provisional winding-up order was made final on 28 April 2017. It was common ground in the court a quo that upon its liquidation the company's only significant liability was its indebtedness to Currin's estate.

[11] The basis for the application in the court a quo, in which the second appellant's father and Cloud CFO (Pty) Ltd were cited as the third and fourth respondents, respectively, was succinctly summarised by the deponent to the founding affidavit as follows:

The Applicants seek [the relief in terms of s 424] as the Respondents have all been knowingly party to the carrying on of the business of the Company with the intention that the Company's creditors be defrauded and for a fraudulent purpose. In the case of the [first and second appellants] they have caused the business of the Company to be carried on recklessly. Essentially [they] have caused the business and assets of the Company to be transferred to [Cloud CFO (Pty) Ltd] ... with the

intention that claims against the Company be frustrated. In particular, the Respondents have sought to prevent a loan owing to Shaun Norman Currin ... from being collected by the trustees of his estate.

[12] The judgment of the court a quo vindicated the allegations summarised in the preceding paragraph and found that the first and second appellants, having been complicit or instrumental in the transfer of the company's business to Cloud CFO (Pty) Ltd at no

consideration and with the intention of frustrating the claims of creditors, and that of Shaun Currin's trustees in particular, were liable to be held personally liable in terms of s 424(1) of the 1973 Companies Act. Most materially for present purposes, paragraph 1 of the court's order consequentially provided that –

It is declared in terms of section 424 (1) of the Companies Act No. 61 of 1973 that [the first and second appellants] are, jointly and severally, personally liable for the debt of R4 687 521,00 which is owed by Company Worx Group Pty Ltd (in liquidation) to the insolvent estate of Shaun Norman Currin (reference C442/2015).

[13] In the context of the background sketched in the preceding paragraphs of this judgment, the court a quo had regard to the following facts in arriving at its finding that the declaration sought by the trustees of Currin's estate was warranted against the appellants:

1. That the company had moved to larger premises as it had required more space (an indication that it was trading viably) and that Cloud CFO (Pty) Ltd commenced its business operation from the selfsame premises (in early 2016) while the company was still trading from there and had continued in occupation of the premises after the company had ceased to trade (in about May 2016).
2. That Cloud CFO (Pty) Ltd took over the company's telephone number.
3. That Cloud CFO (Pty) Ltd took over virtually all of the company's staff, including the first appellant.
4. That Cloud CFO (Pty) Ltd conducted precisely the same business as the company had.
5. That the website of Cloud CFO (Pty) Ltd was strikingly similar to that of the company.
6. That the marketing brochure of Company Worx Group (Pty) Ltd was very similar in appearance to that of the company and replicated its wording almost identically.
7. The so-called business start-up packages offered by the company and Cloud CFO (Pty) Ltd were exactly the same and marketed under the same names.

(Mention might also have been made of the fact that the first appellant continued to work at the business address of the company

after it had gone out of business, but did so then ostensibly as an employee of, or – despite his lack of qualifications

–consultant to, the new company. It might have been noted too that Shaun Currin was also retained by the new company on a monthly stipend.)

[14] The learned judge at first instance held that the first appellant had been in breach of his fiduciary duty by permitting the intellectual property and goodwill of the company to be appropriated by the second appellant for Cloud CFO (Pty) Ltd. He found that the second appellant had also acted in breach of his duty of fidelity to the company as his employer by

appropriating its business. Relying on commentary in Kunst et al. (ed.), Henochsberg on the Companies Act 61 of 1973 that ‘...carrying on any business of the company recklessly means carrying it on by conduct which evinces a lack of any genuine concern for its prosperity’,^[3] Vos AJ concluded that the appellants’ respective conduct constituted ‘reckless trading’ within the meaning of s 424(1).

- [15] In my opinion the pertinent question to which the conduct identified by the judge gave rise was ‘what was its object?’. To characterise the appellants’ behaviour as random, uncoordinated or undirected would be unworlly. One has heard before of cases of disloyal employees acting unlawfully to set themselves up in competition with their employers. Those cases inevitably entail the misappropriation by the delinquent employee of the goodwill of his erstwhile employer and often involve the theft of confidential information or intellectual property, and sometimes even passing off. But how unusual would it not be,

one might ask rhetorically, unless their actions were in concert, for the delinquent employee also to transfer his erstwhile employer to the new business along with all the assets and accoutrements of the old? And how strange that all of that should happen without a murmur of complaint from the holders of the proprietary interest in the plundered business.

- [16] The compelling effect of the conspectus of evidence summarised above is that the transfer of the company’s business to Cloud CFO (Pty) Ltd was deliberate and purposeful. In the absence of a convincing explanation to the contrary, the factual context, including the timing of the actors’ behaviour relative to the proceedings for Shaun Currin’s sequestration, points ineluctably to the object having been to avoid the burden of the only thing of significance that was left in the old business –

its liability to Shaun Currin’s trustees – by stripping the company of its assets and leaving it with its liability.

The conduct was undertaken with the intent to defraud creditors. No other rationale plausibly suggests itself.

- [17] It is necessarily implicit in the judgment of the court a quo - in which the passage in Plascon-Evans Paints Ltd. v Van Riebeck Paints (Pty) Ltd

- [1984] ZASCA 51; 1984 (3) SA 623 at 634-635 was quoted in full, including its illustration of the exception to the ‘general rule’ therein recorded that a court would be justified in rejecting merely on the papers far-fetched or clearly untenable allegations or denials in the answering papers when final relief had been sought on motion - that Vos AJ rejected the claims of the first and second appellants that the second appellant had set up the business of Company Worx Group (Pty) Ltd legitimately in competition with that of the company and its subsidiaries, and that the migration of the latter’s clients to the new business had occurred in the ordinary course and that the timing of those events in relation to that of Shaun Currin’s sequestration was just coincidental. I do not think he can be faulted for having done so; cf. Wightman t/a J W Construction v Headfour (Pty) Ltd and Another

[2008] ZASCA 6, [2008] 2 All SA 512 (SCA), 2008 (3) SA 371 at paras. 12-13 and Buffalo Freight Systems (Pty) Ltd v Crestleigh Trading (Pty) Ltd and Another

[2010] ZASCA 66, [2011] 1 All SA 1 (SCA), 2011 (1) SA 8 at para. 19, approving Eloff AJ's gloss on the rule in Plascon-Evans in Truth Verification Testing Centre CC v AE Truth Detection CC and others 1998

(2) SA 689 (W) at 698H–J. Indeed, in argument before us the appellants' counsel realistically acknowledged that their answering papers were thin and prejudicial to his ability to argue convincingly on their behalf. In addition, their evidence in the insolvency inquiry, which they incorporated by broad-brush reference in their answering papers in the court a quo, was so implausible in relevant respects as to come nowhere near providing a basis to displace the effect of the evidence described earlier.

[18] The question then arises whether such conduct falls to be regarded as part of 'the carrying on of the business' of the company for the purposes of s 424(1). I have no doubt that it does. The purpose of the provision is to discourage the abuse of corporate personality. It is framed to achieve that by providing a mechanism by which those responsible for the grossly negligent or dishonest use of corporate entities can be deprived of the benefit of immunity from personal liability that the legal fiction of juristic personality ordinarily confers on those who carry on business through them; cf. Ebrahim and Another v Airport Cold Storage (Pty) Ltd

[2008] ZASCA 113, 2008 (6) SA 585 (SCA), [2009] 1 All SA 330 at para. 15.[4] It would defeat the object of the provision to interpret it narrowly in a manner that would equate carrying on a company's business only to active trading conducted through the corporate entity.

[19] In the context of proceedings in terms of s 332 of the 1948 English Companies Act, which provided in relevant part, in subsection

(1) thereof, as follows-

If in the course of the winding up of a company it appears that any business of the company has been carried on with intent to defraud

creditors of the company or creditors of any other person or for any fraudulent purpose, the court, on the application of the official

receiver, or the liquidator or any creditor or contributory of the company, may, if it think proper so to do, declare that any persons who were knowingly parties to the carrying on of the business in 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 ...

Oliver J (later Lord Oliver of Aylmerton) rejected an argument that the collection and disposal of a company's assets in the context of closing down its business did not amount to an incidence of the carrying on of its business; see *Re Sarflax Ltd*.

[1979] 1 All ER 529 (Ch.D) at 534-535. He took the view that those charged with conducting the affairs of a company were engaged in carrying on its business in all their actions until the company had performed all the obligations that the fact of trading had imposed on it. I agree with the opinion expressed, with reference to Sarflax, in *Henochsberg op. cit. supra* at p. 916 that '[b]usiness is carried on, within the meaning of the section, even if it does not involve active trading, e.g. if it merely involves the realisation of assets and dealing with their proceeds'.[5]

[20] Turning now to the grounds of appeal. Many of them amounted to complaints about the judge's reasons rather than attacks on the correctness of the result of the proceedings at first instance. It is trite that an appellate court is concerned only with the outcome of the case, and not with the court a quo's reasons for determining that. I shall therefore restrict my discussion only to the issues that the appellants' counsel argued at the hearing of the appeal.

[21] The first ground of appeal was that the court a quo erred in declaring the appellants to be personally liable for the debt in the stated amount of R4 687 521 when such an order had not been sought in terms of the notice of motion. The objection appears to have been raised consequent upon a misconception by the appellants of the effect of the declaration. When the matter was argued before us, however, it eventually became common ground between the parties' counsel that the only effect

of the statement of the amount in the court's order was to peg the appellants' maximum liability in respect of the identified debt in that amount. (There was no cross-appeal against the pegging effect of the declaration that was made.)

[22] The court a quo's declaratory order is not a judgment sounding in money that is exigible against the appellants. The respondents had not sought such an order. As is frequently the case in such matters, the respondents sought only a declaration that the appellants be personally liable 'for all or any debts' of the company, alternatively 'for the debts of the Company in respect of Shaun Norman Currin'. It was therefore necessary for the respondents to prove only the

existence of an unpaid debt owed by the company to Currin, not its quantum. The existence of the debt was not disputed. It was only (unconvincingly) suggested that the R3,5 million purchase price related component of it might be susceptible to

downward adjustment.

[23] The position in the current case therefore differs, for example, from that in *PriceWaterhouseCoopers Inc and Others v National Potato Co-operative Ltd and Another*

[2015] ZASCA 2, [2015] 2 All SA 403 (SCA), in which the plaintiffs sued for a declaration that the defendants were liable for certain identified debts and also for judgments sounding in money against them in respect of each of the debts for which they had been declared liable. It also differs in the respect that is material from the matter of *Cheng-Li Tsung and Another v Industrial Development Corporation of South Africa Ltd and Another* [2013]

ZASCA 26; 2013 (3) SA 468 (SCA), in which the parties had agreed upon the amount in which the defendants would be liable to the plaintiffs if the court were to make a declaratory order against them in terms of s 424(1). It also differs from the examples that are frequently encountered in which a declaration in terms of s 424 is sought in respect of debts that are already the subject of extant judgments sounding in money that have been granted against the company.^[6]

[24] In the current case, if agreement on quantum cannot be reached, it will be necessary for the trustees to obtain a judgment quantifying the amount in which the appellants are actually liable to the insolvent estate consequent upon the declaratory order. This, notwithstanding that the appellants have on previous occasions admitted not only the existence, but also the extent of Shaun Currin's loan account.

[25] The first ground of appeal therefore effectively fell away.

[26] The appellants' counsel also sought to argue that the company would in any event not have been in a position to repay the loan when it fell due. This argument was predicated on the alleged inability of the company to continue effectively in business once it had lost the services of the second appellant because the first appellant was not qualified to carry on with the business on his own. Counsel, with reference to the remarks made by Davis J in the course of his judgment finally sequestrating Shaun Currin, also sought to rely on the inherent fragility of start-up companies to downplay the effect of the representations put forward by the appellants in those proceedings concerning the ability of the company to repay the debt.

[27] As the respondents' counsel pointed out, it is by no means clear that these arguments were adumbrated in the grounds of appeal. They are in any event devoid of merit. Even if one were to accept their factual predicate, they implied that a causal link is required between the reckless trading or fraudulent conduct of those against whom a declaration in terms of s 424(1) is sought and the debts of the company that may be made the subject of it. It is well established that there is no such requirement; see e.g. *Howard v Herrigel and Another* NNO [1991] ZASCA 7; 1991 (2) SA 660 (A) at 672. And to the extent that the judgments in *L & P Plant Hire BK v Bosch* [2001] ZASCA 147, 2002 (2) SA 662 (SCA) and *Saincic v Industro-Clean (Pty) Ltd* [2006] ZASCA 83, 2009

(1) SA 538 (SCA) might have been construed to have held to the contrary, the position has since been clarified in *Fourie v First Rand Bank Ltd* [2012] ZASCA 119; 2013 (1) SA 204 (SCA);

[2013] 1 All SA 291 at paras. 26-31; see also *Tsung supra*, at paras. 26-28.

[28] A declaration of personal liability in terms of s 424(1) is a punitive remedy; see *Philotex (Pty) Ltd and Others v Snyman and Others*; *Braitex and Others v Snyman and Others* [1997] ZASCA 92; 1998 (2) SA 138 (SCA) at 142H-I. By the example he gave in *Saincic* at para. 29,^[7] I understand Harms JA to have illustrated that there should therefore be some relevant connection between the defendant's

conduct and the inability of a creditor to obtain effective redress against the company to merit the imposition of the punishment

inherent in the declaration.[8] I respectfully share the view expressed by Farlam JA in the principal judgment in *Saincic*[9] that the existence of such connection or lack thereof is a matter that will influence the exercise by the court of its discretion in deciding whether or not to make a declaration in terms of s 424. The evidence did establish the existence of a relevant

connection in the current case. The facts suggest that the very purpose of the transfer of the business was to avoid the effect of Shaun Currin's trustees pursuing his loan account claim against the company. Furthermore, having regard to the fraudulent character of the appellants' conduct, there would on any approach have been no basis for the arguments advanced in this regard on the appellants' behalf to have influenced the court a quo to exercise its discretion in their favour.

[29] Lastly, something was sought to be made by the appellants that the trustees of Shaun Currin's insolvent estate had not proven a claim against the company in liquidation. There was nothing in the point. The omission by the trustees to prove their claim does not detract from the existence of the debt, or from the liquidators' standing to seek a declaration in terms of s 424(1) in respect of it. The object of obtaining a declaration is not to create a situation of joint and several liability with the company, but to identify a substituted debtor against which payment of the debt that the company is unable to pay may be exacted; cf. *Saincic supra*, at para. 27. There can be little doubt, in the context of what was said at the outset of this judgment, that the declaration will be used by the trustees, at the instance of ORO, to pursue the claim against the appellants.

[30] The following order is made:

The appeal is dismissed with costs, including the fees of two counsel.

A.G. BINNS-WARD

Judge of the High Court

K.M. SAVAGE

T.D. PAPIER

Judge of the High Court

APPEARANCES

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[1] The judgment is listed on SAFLII: Van Zyl NO and Another v Currin and Others [2018] ZAWCHC 189 (15 October 2018).

[2] The evidence suggests in many respects that no clear distinction was maintained between the company and its subsidiaries. There were no financial statements and the second appellant, who testified at the inquiry into the affairs of the insolvent estate of Shaun Currin conducted in terms of the Insolvency Act 24 of 1936 that he was the general manager of one of the subsidiary companies, described himself in his affidavit in opposition to the application in the court a quo as the general manager of Company Worx Group (Pty) Ltd. The report submitted by the second appellant in Shaun Currin's sequestration application

indicated that Company Worx Group (Pty) Ltd was a trading company that would be able to repay the loan to Currin. It was also the purchaser of Currin's accounting business as a going concern (see paragraph 7, below).

[3] In support of which the commentators cite the following authority: Anderson v Dickson NO (Intermedia (Pty) Ltd intervening) 1985 (1) SA 93 (N) at 110; and cf L&P Plant Hire BK v Bosch 2002

(2) SA 662 (SCA) at 677; Ebrahim v Airport Cold Storage (Pty) Ltd

[2008] ZASCA 113; 2008 (6) SA 585 (SCA) at 18; and further Ex parte Lebowa Development Corporation Ltd 1989 (3) SA 71 (T) at 111; Heneways Freight Services (Pty) Ltd v Grogor 2007 (2) SA 561 (SCA) and Ozinsky NO v Lloyd 1992

(3) SA 396 (C) at 413–414.

[4] In Ebrahim the court was engaged with s 64 of the Close Corporations Act, which, as Cameron JA noted (at para.13), 'is for all intents and purposes identical to s 424 of the Companies Act 61 of 1973'.

[5] The judgment in Sarflax was endorsed by the Court of Appeal in ESS Production Ltd (In Administration) v Sully

[2005] EWCA Civ 554 (11 May 2005) (concerning proceedings under s 217 of the 1986 Insolvency Act exacting personal liability by a director for a company's debts).

[6] The matter of Breytenbach and Another v Evans

[2018] ZAGPPHC 336 (4 May 2018) cited in argument by the respondents' counsel affords such an example.

[7] 'Take the example of company A that incurs a liability towards creditor B for debt C while the business of A was conducted in a fraudulent manner. The fraud did not affect the solvency of the company and debt C was paid. Thereafter A incurs debt D at a time when the business was properly conducted. Due to other circumstances A cannot pay this amount to B. There can be little doubt that B would not be entitled to rely on section 424(1) in these circumstances.' (Per Harms JA.)

[8] In an obiter dictum in Tsung supra, at para. 27, Lewis JA expressed the view that Harms JA intended to indicate that a relevant connection in timing was required between the impugned conduct and the company's inability to pay. I would, with respect, be hesitant to formulate the character of what might provide a relevant connection so restrictively.

[9] In para. 20.

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