

SOUTH AFRICA / JUDGMENT

Maake and Others v Chemfit Finechemical (Proprietary) Limited (5772/2016, HCAA04/2018) [2018] ZALMPPHC 71 (22 November 2018) [2018] ZALMPPHC 71

COURT

Limpopo High Court, Polokwane

BEFORE

EM Makgoba, MF Kganyango, MV Semanya

CASE / FILE NUMBER

5772/2016, HCAA04/2018

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REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE
(1)

REPORTABLE: YES/NO
(2)
OF
INTEREST TO OTHER JUDGES: YES/NO
(3)
REVISED.
CASE NUMBER: 5772/2016
HCAA04/2018
22/11/2018
In

the matter between:

MOKHUTAMANE
KENNETH MAAKE
1ST
APPELLANT
RAMAREDI
MARTHA MPHAAHLELE
2ND
APPELLANT
MICHAEL-JONES
NUNES
3RD
APPELLANT
KLEINBOOI
MUZIWEMPI
4TH
APPELLANT
CHRISTIAAN
JACOBUS ALBERTUS KIRSTEIN
5TH
APPELLANT
And
CHEMFIT
FINECHEMICAL (PROPRIETARY) LIMITED
RESPONDENT

JUDGEMENT

THE COURT

- [1] This is an appeal against the judgment and order of a single Judge of this Division (MG Phatudi J). The learned Judge granted judgment in favour of the Respondent and refused the Appellants' application for leave to appeal. The present appeal before us is with leave of the Supreme Court of Appeal.
- [2] The Appellants, Mokhutamane Kenneth Maake, Ramaredi Martha Mphahlele, Michael-John Nunes, Kleinbooi Muziwempi Twala and Christiaan Jacobus Albertus Kirstein are all directors of Mike's Chicken (Pty) Ltd. The Respondent Chemfit Fine Chemicals (Pty) Ltd t/a SA Premix conducts business in the supply of medicated and nutritional feed additives. Mike's Chicken is in poultry farming operation.
- [3] The Respondent had launched an application against the Appellants for an order in the following terms:
- "1.1 That the First to the Fifth Respondents be and are hereby declared to be delinquent directors pursuant to the provisions of section 162(5) (c) (iv) (bb) of the Companies Act 71 of 2008 (as amended).

1.2 That the First to Fifth Respondents be and are hereby declared to be personally responsible for the debts owing by Mike's Chicken (Proprietary) Limited (under supervision) to the Applicant pursuant to the provisions of section 424(1) of the Companies Act 61 of 1973 (as amended.)

1.3 That in the alternative to 1.2 above, the First to Fifth Respondents, jointly and severally, the one paying the others to be absolved, are ordered to pay the Applicant damages pursuant to the provisions of section 218(2) of the Companies Act 71 of 2008 (as amended) in an amount of R3 126 334.41.

1.4 That the First to Fifth Respondents, jointly and severally, the one paying the others to be absolved, are ordered to make payment of,"

1.4.1 Interest on any amount awarded by the honourable court in terms of prayer 1.2 alternatively 1.3 above at the rate of 10.25% per annum a tempore morae to date of final payment.

1.4.2 The costs of the suit on the scale as between attorney and client."

- [4] The Respondent has abandoned prayer 1.1 and 1.2 of its notice of motion and persisted in proceeding with prayer 1.3 to 1.4. The court a quo granted judgment in favour of the Respondent ordering the Appellants to pay the Respondent the sum of R3 126 334-41 as damages pursuant to the provisions of section 218 (2) of Act 71 of 2008. The court a quo further ordered the Appellants to pay the Respondent's costs.
- [5] The appeal is directed against the whole judgment of the court a quo. The central questions in the appeal are whether the respondent's application for damages could have been brought by way of notice of motion or action, there should have been a joinder of Mike's Chicken (Pty) Ltd and the Business Rescue Practitioner and whether the Respondent's founding affidavit has disclosed a cause of action.
- [6] The Respondent was providing chicken feed to Mike's Chicken on credit from 9th May 2014. Mike's Chicken credit limit was R1.5 million and the product ordered was payable within 30 days after date of statement. On the 12th November 2014 Mike's Chicken credit facility was increased to R4 million with products ordered payable within 30 days of issuing of the statement.
- [7] From October 2015 Mike's Chicken was no longer paying its account on time and it fell into arrears. The Respondent continued to supply Mike's Chicken based on the promises that it will update its account. During March 2016 Mikes Chicken undertook to settle the respondent's arrear account in full by the end of May 2016. In the meantime it offered to pay the Respondent weekly payments of R50 000-00 commencing on the 4th April 2016. Mike's Chicken did not settle the full outstanding amount at the end of May 2016 as promised. On the 1st July 2016 Mike's Chicken was placed under business rescue in terms of Section 129 of the Companies Act 71 of 2008. At the time it was placed under supervision it was owing the Respondent the sum of R3126 334-41.

- [8] On the 4th July 2016 the Third Appellant in his capacity as the director of Mike's Chicken wrote a letter to the Business Rescue Practitioner explaining the circumstances that led to Mike's Chicken being placed under supervision. In that letter he disclosed that Mike's Chicken has been financially distressed by high costs of poultry feed and low selling price of chicken products since 2014.
- [9] The Respondent as the basis for holding the Appellants personally liable for damages it allegedly suffered, alleges that Mike's Chicken when it was placed under supervision it never advised them that it was financially distressed. It contends that had it known about Mike's Chicken's distress, it would not have granted them credit facilities or extended its credit. The Respondent further alleges that Mike's Chicken did not disclose to it that it has sold its poultry feed mill which they acquired during 2014 to Nutri Feeds (Pty) Ltd in order to maintain a feed supply for its broilers. The Respondent submits that it has suffered damages in the sum of R3 126 334-41 being the unpaid amount owed by Mike's Chicken to it.
- [10] The Appellants in their answering affidavit admit that Mike's Chicken was placed under supervision. According to the Appellants the Respondent understood that the cash flow of Mike's Chicken was under pressure as that was discussed when they negotiated the increase of their credit facility. The Appellants further state that the Respondent was kept abreast of the difficulties it was experiencing, hence the Respondent continued to deliver orders to it up to the 14th April
2016. The Appellants contend that even under those difficult conditions Mike's Chicken was at all stages able to meet its
- commitments under normal operating conditions. The Appellants deny that Mike's Chicken has wilfully and intentionally caused its
- operations to become commercially insolvent and thereafter wilfully and /or negligently continued to do business under insolvent
- circumstances.
- [11] The Appellants deny that the amount which the Respondent is claiming represents damages it has suffered as the proposed Business Rescue Plan of Mike's Chicken was accepted on the 2nd December 2016. As per Business Rescue Plan, the Respondent will receive 65 cents in the rand pertaining to its claim, or even receive its full claim. The Appellants further state that the Business Rescue Plan was approved by all creditors, except the Respondent who voted against it. The Appellants further state that all creditors are satisfied with the reasons that led Mike's Chicken to be financially distressed and that the Business Rescue Plan has a reasonable prospect of success. The Appellants are of the view that the Respondent had jumped the gun by declaring that it has suffered a loss of R3 126 334-41 whilst that is not the case.

- [12] The Respondent filed its replying affidavit to the Appellants' answering affidavit. In its replying affidavit it has attached Mike's Chicken audited financial statements for the period ending 2015 which emanates from the founding affidavit in a separate case in which Mike's Chicken had launched an urgent application against the Government. The Respondent is building its case against the Appellants based on the financial statements contained in its replying affidavit.
- [13] The Appellants' appeal was prosecuted out of time and they have applied for the re-instatement of the appeal consequent upon the appeal having lapsed as a result of the Appellants' failure to apply for a date for the hearing of the appeal within the prescribed period. The Respondent did not oppose this application and left the matter in the hands of the Court. We are satisfied that the appellants have shown good cause for their failure to apply for a date of hearing of the appeal. Consequently this appeal is reinstated in terms of Rule 49(6) (b) of the Uniform Rules of Court.
- [14] The Respondent raised a point in limine and argued that the appeal be struck off the roll on the ground that the appellants refused to put up security for the Respondent's costs of this appeal. The Respondent's request for security for costs is based on Rule 49(13)
- (a) of the Uniform Rules of Court.
- [15] The reliance of Rule 49(13) (a) by the Respondent to demand security for costs of this appeal is misplaced. As a general rule an Appellant in the High Court, unlike in the magistrate Court, is not required to furnish security for costs of an appeal. The furnishing of security for costs of an appeal is provided for as an exceptional requirement provided for in Rules 49(12), 49(13) and 49(14). The latter Rules are a sequel to the repealed Rule 49(11) which dealt with the suspension of the operation and execution of an order pending the decision of an application for leave to appeal or appeal. The operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, and the suspension of such a decision are now provided for in section 18 of the Superior Courts Act 10 of 2013. Upon the repeal of Rule 49(11) sub- rules (12), (13) and (14) were left extant.
- [16] The subrules left extant when subrule
- (11) was repealed provide as follows:
- "49(12) If the order referred to subrule (11) is carried into execution by order of the court the party requesting such execution shall, unless the court otherwise orders, before such execution enter into such security as the parties may agree or the registrar may decide for the restitution of any sum obtained upon such execution. The registrar's decision shall be final.
- (13)

- (a) Unless the respondent waives his or her right to security or the court in granting leave to appeal or subsequently on application to it, has released the appellant wholly or partially from that obligation, the appellant shall, before lodging copies of the record on appeal with the registrar, enter into good and sufficient security for the respondent's costs of appeal.
- (b) In the event of failure by the parties to agree on the amount of security, the registrar shall fix the amount and the appellant shall enter into security in the amount so fixed or such percentage thereof as the court has determined, as the case may be.
- (14) The provisions of subrules (12) and (13) shall not be applicable to the Government of the Republic of South Africa or any provincial administration."
- [17] It is clear from the reading of Rules 49(12), 49(13) and 49(14) that all these Rules are subject to the repealed Rule 49(11) which is now replaced by section 18 of the Superior Courts Act 10 of 2013. This simply means that an Appellant is required to furnish security for an appeal only when there is an execution of a Court judgment or order pending an appeal. The circumstances in the present appeal do not require the Appellants to furnish security for costs of the appeal.
- [18] Even if there was an obligation on the Appellants to furnish security for costs of appeal (we still maintain that there is no such obligation) this Court cannot uphold the Respondent's point in limine at this stage. If security for costs is not lodged, the lodging of the copies of the record on appeal with the Registrar constitutes an irregular step within the meaning of Rule 30. In the appeal before us the Respondent has failed to make or lodge an application in terms of Rule 30 calling upon the Appellants to remove the cause of complaint. The application to struck the appeal from the roll is accordingly refused. (See *Jyoti Structures Africa (Pty) Ltd v KRB Electrical Engineers; Masana Mavhuthami Electrical and Plumbing Services (Pty) Ltd t/a KRB Masana* 2011 (3) SA 231 (GSJ).
- [19] Turning to the merits of the appeal, the first issue to be determined is whether the Business Rescue Practitioner and Mikes Chicken (Pty) Ltd should have been joined to these proceedings. The court a quo held that the Business Rescue Practitioner does not acquire corresponding legal interest in the outcome of a /is between the directors and the company's creditors and therefore did not have direct and substantial interest in the pending litigation. With regard to joining of Mike's Chicken to the pending litigation the court a quo held that there was no /is between the Respondent and Mike's Chicken and therefore the issue of non-joinder falls away.
- [20] The test for joinder requires that a litigant must have a direct and substantial interest in the subject matter of the litigation, that is, a legal interest in the subject matter of the litigation which may be affected by the decision of the Court. (See *Pheko and others v Ekurhuleni Metropolitan Municipality* (N02) [2015] ZACC at para 56)
- [21] In determining what constitute direct and substantial interest Mlambo JA in *Gordon v Department of Health, KwaZulu-Natal* [2008] ZASCA 99; 2008 (6) SA 522 (SCA) at 529 C-F said:

". . .In the Amalgamated Engineering Union case (supra) it was found that the question of joinder should ... not depend on the nature of the subject -matter ...but ...on the manner in which, and the extent to which, the court's order may affect the interest of third parties. The court formulated the approach as, first, to consider whether the third party would have locus standi to claim relief concerning the same subject matter, and then to examine whether a situation could arise in which, because the third party had not been joined any order the court might make would not be res judicata against him, entitling him to approach the courts again concerning the same subject-matter and possibly obtain an order irreconcilable with the order made in the first instance. This has been found to mean that if the order or judgment sought cannot be sustained or carried into effect without necessarily prejudicing the interests' of a party or parties not joined in the proceedings, then that party or parties have a legal interest in the matter and must be joined."

[22] The Respondent in paragraph 38.10 of its replying affidavit tenders to refund the Appellants pro rata any amounts that the Respondent may receive either under the business rescue or in consequence of a winding up of Mike's Chicken in the event of the Respondent receiving payment of the claimed amount from the Appellants. From what the Respondent has stated in its replying affidavit it is clear that the order or judgment which the court may make will have an effect on the Business Rescue Practitioner and Mike's Chicken. The Business Rescue Practitioner is the one who will determine whether Mike's Chicken will be liquidated or has been rescued back to its solvent status. In that process of trying to rescue Mike's Chicken, the Business Rescue Practitioner will also be responsible to pay the debts of Mike's Chicken. One of the debt is that of the Respondent. The Respondent will be unduly enriched if it receives double payment for the same debt, and therefore, any amount it receives, the Business Rescue Practitioner should be notified. That is an indication that the Business Rescue Practitioner has a substantial interests in the Respondent's application against the Appellants.

[23] If the Respondent is unsuccessful with its claim to hold the Appellants personally liable, it may still proceed with its claim against Mike's Chicken, and Mike's Chicken can attempt to raise a defence of res judicata. Even if no relief is being sought against Mike's Chicken and the Business Rescue Practitioner, it is clear that they are the necessary parties and have a legal interest in the subject matter. In our view, the Business Rescue Practitioner and Mike's Chicken have direct and substantial interest in the matter, and the determining factor is not whether there is a lis between the parties.

[24] The Appellants' point in limine on non-joinder of the Business Rescue Practitioner and Mike's Chicken has merit and the court a quo erred in dismissing it. However, even if it was upheld it was not a ground to dismiss the Respondent's application. The application could have been stayed pending the joinder of the Business Rescue Practitioner and Mike's Chicken.

[25] We turn to the question whether the Respondent's founding affidavit has disclosed a cause of action. The Respondent has abandoned prayer 1.1 and 1.2 of its notice of motion and it is proceeding with prayers 1.3 to 1.4. Prayer 1.3 is the alternative to prayer 1.2. As per prayer 1.3 the Respondent is claiming damages against the Appellants jointly and severally, the one paying the other to be absolved in terms of section 218 (2) of the Companies Act 71 of 2008 ("CA").

[26] Section 218 (2) of the CA provides as follows:

"Any person who contravenes any provision of this Act is liable to any other person for any loss or damage suffered by that person as a result of that contravention."

[27] Section 218 of the CA imposes liability on any person who contravenes any provision of the Act and who in so doing caused another person to suffer a loss or damage. (See Rabinowitz v Van Graan 2013 (5) SA 315 (GST) and Sanlam Capital Markets v Mettle Manco

[2014] 3 ALL SA 454 (GT). Any person who can sue for loss or damage in our view will include a creditor of the company.

[28] Section 218 of the CA provides a general remedy to any person who suffers loss or damages as a result of contravention of the Act. However, it does not specify which contravention the person may sue for. A creditor may sue a director of a company in his/her personal capacity for the loss or damage it has suffered as a result of that director(s) actions. Since the section does not specify which actions may be regarded as contravention of the CA, it follows that the creditor who sues must specify which contravention were attributed to the director(s) and the exact losses or damages with sufficient particulars. Sufficient facts should be pleaded to enable the director(s) to know which case they would meet.

[29] The Respondent's founding affidavit does not state with sufficient particularity the exact contravention of the Appellants for them to be personally held liable for damages it allegedly suffered. The founding affidavit has concentrated on Mike's Chicken and that whilst trading under insolvent circumstances it continued to incur further debts vis -a- vis its creditors. However, it does not specify which acts have the Appellants allegedly committed which can be viewed as having caused the Respondent's alleged loss.

[30] In Ex Parte De Villiers & another NNO: In Re Carbon Developments 1993(1) SA 493(A) at 504 A-C Goldstone JA said:

"That the statement of our law with regard to the fraudulent incurring of credit is consistent with the following statement by Buckley J in an unreported judgment quoted in Palmer's Company Law 24th ed at 1463: 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."

[31] Even though Mike's Chicken was trading under insolvent circumstances it was hopeful that it will be back on its feet again. Mike's Chicken has also notified the Respondent that it was expecting a bail out from Government. The payment of their debt was restructured with the consent of the Respondent. In our view, the Appellants genuinely believed that the clouds will roll away and the sunshine of prosperity will shine upon them again.

[32] The Respondent has failed in its founding affidavit to show that when the Appellants incurred further credits for Mike's Chicken it was clear that it will never be able to satisfy its creditors. It was only in its replying affidavit that the Respondent tried to build a case against the Appellants. It is trite that in motion proceedings a party seeking relief ought in his /her founding affidavit to disclose such facts as would, if true, justify the relief sought and which would at the same time, sufficiently inform the other party of the case he was required to meet. Simply put, the Applicant ought to make

out a proper case in the founding affidavit and not replying affidavit (See National Council of SPCA v Openshaw [2008] ZASCA 78; 2008 (5) SA 339 (SCA) at 349 A-B).

[33] The court a quo in its judgment has relied more on the Respondent's replying affidavit. In our view, the court a quo has overlooked the fact that the Respondent ought to have made out a proper case in its founding affidavit and not its replying affidavit and on this point alone the appeal stand to succeed.

[34] Furthermore in an effort to make out a case against the Appellants, the respondent relied on contravention of section 22(1) of the CA. Counsel for the Respondent argued that Mike's Chicken contravened the provisions of section 22(1) of the Act in as much as it carried on its business recklessly and that Mike's Chicken did so at the hands of its board of directors, the Appellants.

[35] Section 22(1) of the CA provides that:

"A company must not carry on its business recklessly, with gross negligence, with intent to defraud any person or for any fraudulent purpose."

The question is whether, on the facts of the present case the Respondent has made out any case of recklessness or gross negligence against the Appellants. Can it be said that the Appellants in carrying on the business of the company did so with intent to defraud the Respondent or for any fraudulent purpose for that matter?

[36] The standard of conduct of a director was scrutinized by the Supreme Court of Appeal in Philotex (Pty) Ltd and Others v Snyman and Others; Braitex (Pty) Ltd and Others vs Snyman and Others [1997] ZASCA 92; 1998 (2) SA 138 (SCA) at page 146G-147C.

Howie JA said the following:

" The above -quoted approach suggested in Ozinsky is, of course, an evidential test, not a statement of substantive law, however, it appears to me to accord recognition to the difference between negligence, on the one hand, and recklessness, at least in the form of gross negligence, on the other. Participation in the business necessarily involves taking entrepreneurial risk but s424 only penalizes the subjection of the 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 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-a-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 virtual certainty, that creditors would not be paid, that case would, I think, also involve the

mischievous 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."

- [37] On the facts of this case we make a finding that the directors of Mike's Chicken did not carry on the business of the company recklessly or with gross negligence. In any event, it is an undisputed fact that the Appellants as directors of Mike's Chicken did everything within their powers including injecting their own cash, in an attempt to rescue the company. Such in our view cannot be attributed to persons who were acting recklessly in carrying the operation of the company. The allegation that Mike's Chicken traded under insolvent circumstances is not substantiated anywhere in the Respondent's papers. We are accordingly at large to reverse the judgment of the Court a quo in this regard.
- [38] The third issue is whether the respondent should have launched its claim by way of action or application. Most of the new issues raised by the Respondent in its replying affidavit raise a serious dispute of fact. Even if they were contained in its founding affidavit they were not capable of being resolved on papers. Claims of this nature should be instituted by way of action. A claimant is not barred from instituting a claim by way of motion. However, the claimant pursues that claim in his/her own peril in that should a factual dispute arise which

turns out to be incapable of being resolved on papers, it risks the application being dismissed should the court exercise its discretion not to refer the matter for trial or direct that oral evidence be placed before it. (See *Gounder v Top Spec Investment (Pty) Ltd* [2008] ZASCA 52; 2008 (5) SA 151 SCA). In our view on this point also the appeal stand to succeed.

ORDER

[39] In the result the following order is made:

39.1 The appeal is upheld with costs.

39.2 The order of the court a quo is set aside and substituted with the following:

"The Application is dismissed with costs."

EM MAKGOBA JP

JUDGE PRESIDENT OF THE HIGH COURT,

LIMPOPO, DIVISION POLOKWANE

I AGREE

MF KGANYANGO J

JUDGE OF THE IDGH COURT, LIMPOPO

DIVISION, POLOKWANE

MV SEMENYA J

JUDGE OF THE IDGH COURT, LIMPOPO

DIVISION, POLOKWANE

APPEARANCE:

COUNSEL FOR THE APPELLANTS : Adv. G.J DIAMOND

INSTRUCTED BY

: KIRK TWINE ATTORNEYS

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: Adv. J VAN ROOYEN

INSTRUCTED BY

: DONNE E BRUWER ATT

DATE OF HEARING

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