ORDECO (PRIVATE) LIMITED
versus
DAVID GOVERE
and
THE REGISTRAR OF DEEDS N.O

HIGH COURT OF ZIMBABWE
CHIGUMBA J
HARARE, 20 March 2013 & 5 June 2013

E.T. Moyo, for the applicant
N. Bvekwa, for the respondent

Opposed Application

CHIGUMBA J: This is an application in terms of s 318 of the Companies Act [*Cap 24:03*] for an order declaring the first respondent to be personally liable for the judgment debt of Coldrac Products Private limited t/a Tacoola Beverages in case number HC 3159/11.

The relief that the applicant seeks is that:

1. The first respondent be declared to be personally liable for the payment of the entire judgment debt against Coldrac Products (Private) Limited t/a Tacoola Beverages (hereinafter referred to as "Coldrac"), in case number HC3159/11

2. First respondent pay the sum of US$112 000,00 together with interest thereon calculated at the rate of 5% per annum with effect from 1 December 2011, to the date of payment in full, within seven days of the date of this order failing which applicant shall be entitled to execute this order against first respondent's immovable property.

3. A declaratory order declaring first respondent's immovable properties, registered under Deeds of transfer DT 8110/99 and DT 3472/07 executable to satisfy the judgment debt.

4. First respondent pays costs on a Legal Practitioner- Client scale.

This application is based on the averment that, first respondent, personally or together with the other directors of Coldrac, carried on the business of Coldrac, recklessly or with intent to defraud the creditors of Coldrac, in particular the applicant. The background to this application is that:

On 8 November 2011, an order by consent was entered into in case number HC 3159/11, whereby applicant (plaintiff in that matter) agreed with Coldrac (first Defendant) and David Govere (second Defendant), that:

(a) First defendant shall pay the Plaintiff the sum of US$87 000, 00 being the amount of outstanding rentals.
(b) First defendant shall pay the Plaintiff US$21 400, 00 being the amount of outstanding operating costs.
(c) The first defendant shall pay the plaintiff the sum of US$ 3 500, 00 being the plaintiff's wasted legal costs on a Legal-Practitioner client scale.
(d) The second defendant shall be absolved from the instance.
(e) All payments shall be made to the plaintiff in thirteen equal monthly installments payable by the last day of each month, commencing in December 2011, failing which the plaintiff shall be entitled to execute on the entire outstanding amount.

Applicant contended that at all material times, from the time that it leased its premises to Coldrac (the lease from which the judgment debt arose) it knew first respondent as the main director of Coldrac. Applicant contended further, that first respondent admitted to being a director of Coldrac in para 6 of the opposing affidavit in case number HC 3826/11 between the same parties, and tendered proof of first respondent's directorship in Coldrac by way of a letterhead which on 10 June 2011 listed him as one of the directors of Coldrac.

According to applicant, the conduct of the directors of Coldrac which brings them squarely within the ambit of section 318 of the Companies Act is firstly, failing to ensure that the company returns pertaining to past and present directors, namely the form CR14 were updated to reflect the correct directorship. Secondly that, despite being in dire financial straits, from May 2010 as evidenced by the payment plan attached to this application, Coldrac continued to carry on business knowing full well that it would be unable to meet its rental and other obligations as a tenant of the applicant. Coldrac continued to incur debts, despite having ceased to operate in

August 2011. Applicant averred that it has no other remedy available to it. Applicant also submitted that it has no knowledge of the current whereabouts of the other directors of Coldrac.

First respondent denied being a director of Coldrac, and pointed out that, according to the form CR14 at the Companies Registry Office the directors of Coldrac are listed as Mark Kerel Kopecky; James Micheal Eaton; Mchiville John Owen; and Denzil Rad Ford Julian` Essof. First respondent admitted to being a director of Coldrac between 2004 and 2007, in what is described as an "unofficial capacity", because he acquired only 80 % of the shareholding in Coldrac, with the original shareholders retaining 20% of the shareholding. He denied trading recklessly or with intention to defraud the creditors of Coldrac during the period that he was an unofficial director. First respondent denied ever personally running the affairs of Coldrac or ever personally dealing with the applicant, or that he was the brains behind Coldrac as alleged.

In reply, applicant contended that it is immaterial whether first respondent ran Coldrac personally for purposes of establishing liability in terms of s 318 of the Companies Act. It averred that, in fact, by virtue of having entered into the order by consent in which Coldrac undertook to discharge its indebtedness to applicant knowing full well that Coldrac was unable to pay as agreed, it could be said that first respondent brought himself squarely within the four corners of s 318.

The issues that fall for determination by this court are:

(a) Whether at all material times first respondent was a director of Coldrac, the judgment debtor.

(b) Whether first respondent and or the other directors, knowingly conducted the business of Coldrac in a reckless manner, or with intention to defraud its creditors, including the applicant, or with gross negligence.

(c) Whether first respondent's immovable properties should be declared executable to satisfy applicant's judgment debt.

(d) Whether first respondent should be ordered to pay costs on a Legal Practitioner-Client scale.

DIRECTORSHIP OF COLDRAC PRODUCTS

At the hearing of the matter applicant submitted that it had adduced sufficient evidence to demonstrate that first respondent was, at all material times, a director of Coldrac, by way of the company letterhead, and various documents alluded to in the application, and by first respondent's own admission to that effect. It is this court's finding that it is satisfied, that first respondent held himself out to be, a director of Coldrac. First respondent's "unofficial directorship" status was known only to him and the other directors. His name was on the letterhead of Coldrac as a director. He negotiated contracts for and signed letters in his capacity as a director of Coldrac. His actions gave rise to a general impression that he was a director of Coldrac. The creditors of Coldrac relied on their previous dealings with first respondent in which he held himself out to be a director of Coldrac. The onus was on first respondent to ensure that the formCR14 was altered to reflect the fact that he was now a majority shareholder and director of Coldrac.

Section 115 of the Companies Act provides as follows:

> **"115 Register and index of members**
> (1) Every company shall keep a register of its members and punctually enter therein the following particulars—
>
> (a) the names and addresses of the members, a statement of the shares held by each member, distinguishing each share by its number so long as the share has a number, and of the amount paid or agreed to be considered as paid on the shares of each member;
> (b) the date at which each person was entered in the register as a member;
> (c) the date at which any person ceased to be a member:
>
> (4) Every company having more than fifty members shall, unless the register of members is in such a form as to constitute in itself an index, keep an index of the names of the members of the company and shall, within fourteen days after the date on which any alteration is made in the register of members, make any necessary alteration in the index."

First respondent did not comply with any the provisions of section 115. First respondent is estopped from relying on his failure to comply with the statutory requirements of the Companies Act to evade liability emanating from prejudice that arose as a result of that misconduct.

The question that then arises is whether it is necessary, for purposes of s 318 of the Companies Act, that 1st respondent be found to have been a director of Coldrac at all material times, including the time when the judgment debt was incurred. Applicant directed the court's attention to s 187(7) of the Companies Act, which provides that:

> "(7) The resignation of a director or a secretary shall not relieve him of his duties as director or secretary, as the case may be, under this Act or under the articles of the company unless the director or secretary, having notified the Registrar and the company of his resignation, had reasonable ground to believe that the company would comply with subs (4)."

In my view, s 187(7) places an onus on a director of a company who has resigned, to notify the company and the registrar of companies of the fact of his resignation. First respondent has not averred that he complied with this provision. The effect of failure to comply with s 187(7) is that first respondent it still bound by his duties as a director of Coldrac, as if he has not resigned as he alleges. So the question of whether he was a director at all material times is irrelevant. He was a director between 2003-2007 by his own admission. In the absence of proof that when he resigned he notified Coldrac and the registrar of companies, he is deemed to be a director of Coldrac to all intents and purposes, bound by the duties of a director.

In the case of *Christopher William Barnsley* v *Harambe Holdings, HH-84-2012*, which involved an application for piercing the corporate veil, it was held, on p 3, that

> "… the courts have always readily lifted the corporate veil where the company is used as a vehicle for fraud or to justify wrong".

Accordingly, first respondent cannot rely on the fact that his name is not on the current form CR14 of Coldrac, when the onus was on him to ensure that Coldrac complied with all statutory requirements in terms of the Companies Act, and he failed or neglected to perform that duty. I find that first respondent was bound by the duties of a director of Coldrac between 2003-2007, and after 2007 remained bound, to date.

REQUIREMENTS OF SECTION 318 OF THE COMPANIES ACT

Section 318 of the Companies Act provides as follows:

"(1) If at any time it appears that any business of a company was being carried on—

(a) recklessly; or

(b) with gross negligence; or

(c) with intent to defraud any person or for any fraudulent purpose;

the court may, on the application of the Master, or liquidator or judicial manager or any creditor of or contributory to the company, if it thinks it proper to do so, declare that any of the past or present directors of the company or any other persons who were knowingly parties to the carrying on of the business in the manner or circumstances aforesaid shall be personally responsible, without limitation of liability, for all or any of the debts or other liabilities of the company as the court may direct".

The applicant submitted that, having successfully established that 1st respondent was and is currently deemed to be a director of Coldrac, it has also successfully demonstrated that he acted recklessly by entering into the order by consent knowing full well that Coldrac did not have the means to settle the judgment debt, and by allowing Coldrac to continue to occupy the leased premises, knowing full well that it could meet its rental and other obligations as a tenant. It was submitted further, that this conduct on first respondent's part is tantamount to intention to defraud the applicant. In other words, applicant charges first respondent with contravening s 318(1) (a) and 318(1) (c). I find the applicant's arguments persuasive.

In the case of *Everton Gardens Projects CC 2010 ZASCA 35,* it was held that:

"The limited liability is afforded to persons who conduct business through the medium of a company. It is not there to protect them against conduct which is reckless or that takes place with fraudulent intent."

Once a court has found the conduct of the director to be reckless, grossly negligent, or to be motivated by fraudulent intent, then the principle of limited liability in the conduct of company business ought to be set aside. In the case of *Alcock* v *Mayhew 1990 (2) ZLR 346 (H)* it was held that:

"…the proof of fraud is an essential requirement and in order to establish this element it must be proved that respondent made a false representation with intent to deceive. The representation to creditors would be that the company had sufficient funds to make payment to the creditors concerned".

I am persuaded by the applicant's submission that this is exactly what first respondent did when he entered into the deed of settlement on Coldrac's behalf, knowing full well that Coldrac

did not have the means to fulfill the settlement terms. Coldrac misrepresented its capacity to pay the agreed sums within the stipulated time periods. In my view it is proper that first respondent, in his capacity as a director of Coldrac, who was knowingly party to the carrying on of business by Coldrac recklessly and with intention to defraud its creditors be held personally responsible, without limitation of liability, for the discharge of the judgment debt in case number HC3159/11.

Having made the above declaration, it follows that the application is granted, and first respondent's immovable properties are declared specially executable. I have considered the question of whether costs should be awarded against first respondent on a higher scale and it is my view that the parties had already agreed to costs on a higher scale in their order by consent. I see a reason to alter that agreement.

ORDER

It is hereby ordered that:

1. The first respondent is liable for the payment of the entire judgment debt against Coldrac Products (Private) Limited t/a Tacoola Beverages in case number HC 3159/11.

2. The first respondent shall pay to the applicant the sum of US$112 000,00 together with interest thereon calculated at the rate of 5% per annum as received, from 1 December 2011 to the date of full and final payment, within seven days of the date of this order, failing which the applicant shall be entitled to execute this order against first respondent's immovable properties being, an undivided share being share number 1 in a piece of land situate in the district of Salisbury being remainder of Lot 4 Athlone Township of Greengrove and stand number 783 Bannockburn Township of Stand 1 Bannockburn Township registered under Deed of Transfer number 8110/99 and 3472/07 respectively.

3. The first respondent shall pay costs of suit on a legal practitioner – client scale.

Messrs Scanlen & Holderness, applicant's Legal Practitioners
Messrs Bvekwa Legal Practitioners, respondent's Legal Practitioners