NOT REPORTABLE

CASE NO.: I 1425/2009

IN THE HIGH COURT OF NAMIBIA

In the matter between:

CHINA JIANGSU INTERNATIONAL NAMIBIA LIMITED

PLANTIFF

and

J. SCHNEIDERS BUILDERS CC **1ST DEFENDANT**

JAKOBUS SCHNEIDERS **2ND DEFENDANT**

***CORAM*:** **HENNING, AJ**

Heard on: 27 September 2010

Delivered on: 5 October 2010

JUDGMENT

HENNING, AJ:

[1] These are exceptions in which the plaintiff seeks to have the defendants' defences set aside. In order to determine the issues it is necessary to refer to the pleadings. The plaintiff instituted action against the defendants for payment of amounts resulting from an oral construction agreement concluded during April 2005 for the erection of ten residential dwellings at Opuwo. This is admitted. It is further common cause

[1.1] that a dispute arose as a result of which the plaintiff stopped the work in terms of the oral agreement,

[1.2] that the dispute was settled by way of a written agreement dated 2 April 2006,

[1.3] that the oral agreement was concluded between the plaintiff and the first defendant, represented by the second defendant,

[1.4] that the written agreement was concluded between the plaintiff and the first defendant, represented by the second defendant "*in his capacity as Director,*"

[1.5] that the written agreement embodied terms relating to payment by the first defendant in various amounts over a period,

[1.6] that the plaintiff complied with its obligations in terms of the written agreement and that the houses were handed over to the eventual purchasers,

[1.7] that the first defendant still owes the plaintiff an amount of N$166 028.15 in respect of the contract price.

[2] The plaintiff excepted to the first defendant's plea as disclosing no defence. It was conceded by counsel appearing for the defendants that the exception had to succeed. It was, however, submitted that leave should be granted to the first defendant to amend its plea. This seems to be in accordance with the *"invariable practice"* referred to in *Group Five Building Ltd v Government of the Republic of South Africa (Minister of Public Works and Land Affairs)* 1993 (2) SA 593 (AD), at 602 D.

[3] In respect of the claim against the second defendant, it is not disputed that the second defendant is the sole member of the first defendant, that he is responsible for the management of the business of the first defendant, and in particular represented the first defendant in concluding the agreements referred to above.

[4] The following additional averments are made:

"13. At the time when the plaintiff and the first defendant entered into the aforesaid agreements, the second defendant knew the first defendant was or would be unable to pay the full contract price.

14. The second defendant therefore acted (and was carrying on the business of the first defendant) in a reckless or fraudulent manner with the intent to defraud the plaintiff.

15. The plaintiff is therefore entitled to an order in terms of which the second defendant is declared to be personally liable for the debt of the first defendant to

> *the plaintiff in terms of Section 64 the Close Corporations Act, Act 69 of 1984."*

These allegations are denied in paragraph 8 of the plea.

[5] The plaintiff noted an exception in respect of the second defendant's defence, based on the denials referred to in the previous paragraph. The plaintiff relied upon section 64 of the Close Corporations Act, 69 of 1984 ("*section 64")*

> *"on the ground that the second defendant acted in a reckless or fraudulent manner with the intent to defraud the plaintiff when he entered into the aforesaid agreement with the plaintiff knowing that the first defendant was or would be unable to pay the full contract price."*

The plaintiff further relied on the fact that the second defendant is the sole member of the first defendant and represented the first defendant when the aforesaid agreements were entered into with the plaintiff. On this issue the plaintiff concludes:

> *"The aforesaid denial constitutes a bare denial especially in light of the fact that the first defendant has admitted that it has not paid the balance of the contract price and that it is indebted to the plaintiff in the amount claimed without advancing any reasons for such failure."*

[6] On behalf of the plaintiff reference was made to *Nationwide Detectives and Professional Practitioners CC v Standard Bank of Namibia Ltd,* 2008 (1) NR 290. At page 299 E-F the Court with approval cited the following *dictum* from an earlier case.[1]

> *"The organic or alter ego doctrine recognizes that in some situations the acts, intentions and knowledge of certain persons are the acts, intentions and knowledge of the company. This is because the company is not a visible person. It has no physical existence, no body parts or passion, no mind or will of its own. It has 'no body to kick and no soul to damn and the only way of ascertaining its intentions is to find out what its directors acting as such intended'*

> *(per Centilivres CJ in Commissioner for Inland Revenue v Richmond Estates (Pty) Ltd 1956 (1) SA 602 (A) at 606G). Such persons*

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[1]Lees Export and Export (Pty) Ltd v Zimbabwe Banking Corporation Ltd 1999 (4) SA 1119 (ZSC) at 1129 B-F

> *therefore are the directing mind and will of the company and control what it does; the very ego and centre of its personality; its embodiment. They do not act or think on behalf of or for the company as its agents. Rather they act and know and form intentions through the persona of the company".*

The plaintiff argued that the second defendant is the sole directing mind of the first defendant, that he was responsible for the first defendant's default and is, in terms of *section 64* personally liable.

[7] The second defendant's counsel contended that the debt was incurred when the written agreement was concluded in April 2006, that *section 64* has not been properly pleaded,

and that the plea denied the alleged liability of the second defendant.

[8] The starting point of the enquiry is *section 64.* It reads:

> *"If it at any time appears that any business of a corporation was or is being carried on recklessly, with gross negligence or with intent to defraud any person or for any fraudulent purpose, a Court may on the application of the Master, or any creditor, member or liquidator of the corporation, declare that any person who was knowingly a party to the carrying on of the business in any such manner, shall be personally liable for all or any of such debts or other liabilities of the corporation as the Court may direct, and the Court may give such further orders as it considers proper for the purpose of giving effect to the declaration and enforcing that liability."*

[9] In *Harri and Others NNO v On-line Management CC and Others,* 2001 (4) SA 1097 (T) at 1099 F it was stated that *section 64*

> "*is aimed at discouraging fraudulent, dishonest and reckless persons from abusing the protection which is provided by a corporate entity.*"

The element of *"gross negligence"* could, with respect, have been added.

[10] It is correct that the decisions and actions of the first defendant were taken and performed by its *alter ego* the second defendant. The second defendant caused the construction work to be performed and caused the first defendant not to meet all its financial obligations. The second defendant caused the first defendant to admit liability on the existing pleadings and caused the first exception to be conceded. The second defendant, however, seeks to escape liability in terms of *section 64* by way of denials. In respect of paragraphs 13 to 15 of the particulars of claim (referred to in paragraph 4 above) the second defendant responded:

> *"The defendants deny each and every allegation contained herein as if specifically considered, traversed and denied".*

The question arises whether this form of pleading is in the circumstances permissible.

[11] Rule 18 (4) reads:

> *"Every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defence of answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto."*

Denials are specifically addressed by rule 18 (5) which provides:

> *"When in any pleading a party denies an allegation of fact in the previous pleading of the opposite party, he shall not do so evasively but shall answer the point of substance".*

Rule 22 (2) states:

> *"The defendant shall in his plea either admit or deny or confess and avoid all the material facts alleged in the combined summons or declaration or state which*

of the said facts are admitted and to what extent, and shall clearly and concisely state all material facts upon which he relies".

[12] Herbstein and Van Winsen, *The Civil Practice of the High Courts in South Africa,* 5th ed., Vol I, 566 formulates the general rule as follows:

"A pleading must allege the facts that are required in order to disclose a cause of action or defence. A pleading that states conclusions and opinions instead of material facts, or that draws a conclusion without alleging the material facts, which, if proved, would warrant that conclusion, is defective".

In *Neugebauer & Co. Ltd v Bodeker & Co. (SA),* 1925 A D 316 it was held at 319 that

"the ground of defence must be stated with sufficient precision and in sufficient detail to enable a plaintiff to know what case he has to meet."

On the pleadings in that case it was found at 320:

'On this plea the plaintiff is entirely in the dark as to what the defence is."

[13] *"In law context is everything,"* Lord Steyn said in the House of Lords[2]. In view of the admissions by the second defendant referred to above and the plaintiff's allegations in paragraphs 13 to 15 (see paragraph 4 above), the second defendant should

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[2] R v. Secretary of State for Home Department, Ex parte Daly, [2001] 3 All ER 433 at 447, quoted in Seven Eleven Corporation of SA (Pty) Ltd v. Cancun Trading Co 150 CC, 2005 (5) SA 186 (SCA) at 196 C

not deny evasively, but should answer the point of substance – rule 18 (4), and he shall clearly and concisely state all material facts upon which he relies. His denial of each and every allegation in these paragraphs of the claim, does not answer the point of substance, does not state any material facts, and could be called a "*negative pregnant*," which is ambiguous - *Britz v. Weideman* 1946 OPD 144, at 150 and 157. To the list of instructive early cases can be added *SA Railways and Harbours v Landua & Co* 1917 TPD 485 and *Dlamini v Jooste* 1925 OPD 223.

[14] In the more recent case of *Sterling Consumer Products (Pty) Ltd v Cohen and other related cases* [2000] 4 All SA 221 (W) reference was made (226 b – c) to Harms, *Civil Procedure in the Supreme Court,* at 276 where the learned author states:

> *"The plea must clearly show which facts are admitted and which are denied. The plea may deny each and every allegation of fact contained in a particular paragraph of a declaration or combined summons but must not give rise to ambiguity as lack of clarity."*

The Court mentions (226 a) the definition of "*evade*" in the Oxford English Dictionary as *inter alia*

> *"to avoid giving a direct answer to,"*

or

> *"to avoid or shirk the discussion."*

The Court concluded (227 c):

> *"In the light of the aforegoing, I conclude that a defendant may plead a bare denial of each and every*

allegation of fact alleged in a plaintiff's particulars of claim provided, firstly, that such denial does not give rise to ambiguity or lack of clarity and provided, secondly, that such denial is not evasive but answers the point of substance.

[15] In view of the above-mentioned principles, it seems necessary to analyse the second defendant's denials. Paragraph 13 of the particulars of claim, referred to in paragraph 4 above, consists of the following elements:

[15.1] when the first agreement was concluded the second defendant knew that the first defendant was unable to pay the full contract price,

[15.2] when the second agreement was concluded the second defendant knew that the first defendant was unable to pay the full contract price,

[15.3] when the first agreement was concluded the second defendant knew that the first defendant would be unable to pay the full contract price,

[15.4] when the second agreement was concluded the second defendant knew that the first defendant would be unable to pay the full contract price.

[16] Paragraph 14 of the claim, similarly, embodies a number of allegations, *inter alia:*

[16.1] the second defendant acted in a reckless manner,

[16.2] the second defendant acted in a fraudulent manner,

[16.3] in acting in a reckless manner the second defendant intended to defraud the plaintiff,

[16.4] in acting in a fraudulent manner the second defendant intended to defraud the plaintiff,

[16.5] the second defendant was carrying on the business of the first defendant in a reckless manner,

[16.6] the second defendant was carrying on the business of the first defendant in a fraudulent manner,

[16.7] the second defendant was carrying on the business of the first defendant in a reckless manner with intent to defraud the plaintiff,

[16.8] the second defendant was carrying on the business of the first defendant in a fraudulent manner with intent to defraud the plaintiff.

[17] The second defendant is the embodiment of the first defendant, the very ego and centre of its personality. He is not in a no knowledge situation. He confined his reply to the above allegations to a denial. His denial is inconsistent with the admission of paragraphs 8 to 10 of the claim. His denial is ambiguous and fails to answer the point of substance. His denial is evasive. For the plaintiff to go to trial on the existing plea would demand speculation regarding the defence.

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

[18.1] The exceptions succeed with costs and the defendant's plea is set aside.

[18.2] Leave is granted to the defendants to, if so advised, file an amended plea within 15 days from date of delivery of this judgment.

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HENNING, AJ

ON BEHALF OF PLAINTIFF: Adv. N Bassingthwaighte
Instructed by
H D Bossau & Co

ON BEHALF OF DEFENDANTS: Mr. C. J Verwey

Theunissen, Louw &
Partners