THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 128/2018

In the matter between:

ANTON DE WAAL ALBERTS	**FIRST APPELLANT**
PAUL JACOBUS DU PREEZ	**SECOND APPELLANT**
DARRELL STRYDOM	**THIRD APPELLANT**

and

DANIEL JACOBUS LOUIS NEL NO	**RESPONDENT**

Neutral citation: *De Waal Alberts & others v Louis Nel* (128/2018) [2019] ZASCA 33 (28 March 2019)

Coram: Leach, Tshiqi, and Zondi JJA and Davis and Eksteen AJJA

Heard: 05 March 2019

Delivered: 28 March 2019

Summary: Summary judgment – bona fide defence established – joint and several liability – co-directors had a right to challenge the order.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Ranchod J, Molopa J and Makgoka J sitting as a court of appeal):

1 The appeal is upheld with costs of two counsel.

2 The order of the full court in the Gauteng Division of the High Court is set aside and substituted as follows:

'a. The appeal is upheld with costs of two counsel.

b. The order of the court a quo is set aside and substituted as follows:

i. The application for summary judgment is dismissed with costs.

ii. The defendant is granted leave to defend the action.'

JUDGMENT

Tshiqi JA (Leach and Zondi JJA and Davis and Eksteen AJJA concurring):

[1] The respondent (plaintiff in the trial court), Mr Daniel Jacobus Louis Nel, acting in his capacity as a trustee of an entity known as the Mankwe Trust instituted action in the North Gauteng High Court, Pretoria against the appellants (defendants in the trial court) who were cited as second, fourth and seventh defendants. The defendants were sued in their respective capacities as directors of a firm of attorneys practising as Alberts, Bekker, Vorster, Pillay & Associates Incorporated, a private company duly incorporated in terms of ss 32 and 49(4) of the Companies Act 61 of 1973 (the Companies Act), having a share capital and a memorandum of association incorporating the provisions of s 53*(b)* of the Companies Act. The company was cited as the first defendant and the other directors who are not parties to this appeal were cited as the third, fifth, sixth, eighth, ninth, tenth, and eleventh defendants. Another co-

director, Mr Rock Haywood was not cited and not joined as a party in the proceedings. The action was based on an alleged irrevocable company guarantee dated 25 February 2011 contained in a letter bearing the letterhead of the company and signed by Dr Andre Vorster, one of the directors of the company who was cited as the eleventh defendant.

[2] The defendants filed a notice of intention to defend the action. The plaintiff in turn filed an application for summary judgment. The application for summary judgment was opposed by the defendants who raised several points in *limine* and other defences. The application was heard by Webster J, who found that the points raised were all irrelevant, raised no bona fide defence and further that the guarantee was not ambiguous. He granted the relief prayed for 'against all defendants, the one paying to absolve the other for the sum of R4 million and interest a *tempore mora* at the rate of 15,5% plus costs of suit'.

[3] The defendants applied for leave to appeal but, before leave to appeal was granted to the full court of the Gauteng Division, Pretoria, the company was liquidated. The liquidators, apparently because of lack of funding, decided not to proceed with the appeal on behalf of the company. The sixth and ninth defendants also did not proceed with the appeal. On appeal, all the points that had been raised before Webster J were again raised before the full court which disposed of the appeal on a single narrow issue. It held:

'The company had incorporated in its memorandum of association the provisions of s 53*(b)* of the Companies Act 61 of 1973 which provides that the directors and past directors of the company shall be liable together with the company for such debts and liabilities of the company as were contracted during their respective periods of office. Hence, the liability of the directors in this matter depends entirely on whether the company was (and is) indeed indebted to the [plaintiff] for R4 000 000. The appeal of the present [defendants], who are former directors of the company, can only succeed if the summary judgment against the company is set aside. It follows that an appeal should have been lodged on behalf of the company by its liquidators as it was placed in liquidation after summons was issued.

As matters stand, the summary judgment granted by Webster J against the company is unchallenged, and therefore a valid debt of the company even though it is in liquidation.

It therefore follows that by virtue of s 53 of the Companies Act the directors of the company are liable, with the company, jointly and severally for satisfaction of the judgment debt of the company.'

It then dismissed the appeal with costs. This appeal is with the leave of this court.

[4] Two issues arise in this court, whether: (a) summary judgment should have been granted by the court of first instance; and (b) the full court was correct in holding that the co-directors of the company were precluded from appealing against the order.

[5] It is apposite to start with the first issue. Summary judgment is an extraordinary, drastic remedy, in that it closes the door to a defendant who wishes to defend an action. It should only be granted if the plaintiff's case is unimpeachable or the defence is bogus or bad in law or where the giving of notice to defend amounts to an abuse of the court process. (*Maharaj v Barclays National Bank Limited* 1976 (1) SA 418 (A) at 423F-G; *Edwards v Menezes* 1973 (1) SA 299 (NC) at 303E-F).

[6] In its particulars of claim, the plaintiff alleged that it, on behalf of Mankwe Trust, entered into an agreement with Southern Palace 194 Investments (Pty) Ltd (Southern Palace) and one Louis Steyn in terms of which it sold 5% shareholding in an entity called Inyanga to Southern Palace and Steyn for R4 million. The purchase price was payable on or before 31 October 2010. Southern Palace and Steyn failed to pay the purchase price in terms of the agreement and a second agreement was entered into on 9 February 2011. In the second agreement, the parties recorded that Southern Palace and Steyn had failed to perform in terms of the first agreement and agreed that Southern Palace and Steyn would pay an amount of R1 000 000 on or before 30 March 2011, after which the plaintiff would have no further claim against Southern Palace or Steyn. On 25 February 2011 Southern Palace and Steyn entered into a third agreement with the plaintiff, Mankwe Trust represented by Nel, in terms of which Southern Palace and Steyn purchased 5% of the issued share capital in Inyanga from the plaintiff for an amount of R4 million payable on 31 October 2010.

[7] The particulars of claim further alleged that on or about 25 February 2011 the company provided Inyanga with an irrevocable guarantee in the amount of R4 million; that the guarantee was valid until Southern Palace made a wire transfer in the amount

of R4 million to Inyanga on or before 31 March 2011; that on or about 25 February 2011 Inyanga ceded its rights, title and interest in the guarantee to the plaintiff (Mr Nel in his capacity as a trustee of Mankwe Trust); that on or about 4 March 2011, the plaintiff called for payment of the amount of R4 million from the company; and that the company failed to perform in terms of the guarantee.

[8] The alleged guarantee read as follows:

'IRREVOCABLE COMPANY GUARANTEE

INYANGA TRADING 444 (PTY) LTD

. . . .

Dear Sirs,

MATTER: SALE OF SHARES AGREEMENT: SOUTHERN PALACE INVESTMENTS 194 (PTY) LTD // INYANGA TRADING 444 (PTY) LTD / Mr JP NEL (INYANGA TRUST)

We, Alberts Bekker Vorster Pillay & Associates Incorporated do hereby unconditionally guarantee and swear under penalty of perjury to provide the necessary security in hand in the amount of R4, 000,000.00 (Four Million Rands) in favour of Inyanga Trading 444 (Pty) Ltd with Registration Number: 2006/002142/07 with physical address known as 78 Gleneagles Drive, Silver Lakes, Pretoria, 0054.

We. Alberts Bekker Vorster Pillay & Associates Incorporated hereby unconditionally guarantee that this Irrevocable Company Guarantee is supported and financially backed by a Mexican Sovereign Financial Bond known as a Mexican Estados Estados Mexicanos Bonos De Liquidacion De Los Sueldos De Los Empleados Federales 1923 series "B" with denominations of US$100, with bond serial number 073528 and with a value of US$ 58 000 000.00 (fifty eight million united states dollars).

We further confirm that, to the best of our knowledge, the Company Guarantees are from legally earned, good, clean and cleared funds of non-criminal origin, free of any liens or encumbrances, and this irrevocable Company Guarantee in the amount of R4, 000,000.00 (Four Million Rands) is valid for a period until Southern Palace Investments 194 (Pty) Ltd made a wire transfer in the amount of R4, 000,000.00 (Four Million Rands) to Inyanga Trading 444 (Pty) Ltd or before 31 March 2011 at close of banking hours at this office upon the respective expiry date.

This guarantee shall be governed by and construed with the laws of South Africa and shall be subject to the jurisdiction of the South African courts.

This Irrevocable Guarantee is subject to the conclusion as pertained in the terms and conditions of compliance being met on or before 14 March 2011.

The authorized signatory herein is in full control of this Irrevocable Company Guarantee.'

[9] In order to successfully oppose the application for summary judgment, the company had to show that it had a bona fide defence to the claim. As appears from the particulars of claim, it was alleged that the guarantee was furnished as security for a debt arising from a sale of shares by Mankwe Trust to Southern Palace, as recorded in the first, second and third agreements between the two entities. The terms of the alleged guarantee had to be interpreted against the backdrop of these alleged agreements, specifically the third agreement dated 25 February 2011.

[10] The main and fundamental problem with the alleged guarantee is that it is, at the very least, confusing and can also be subject to attack for different reasons. First, in terms of the alleged guarantee the company appears to undertake to provide security in favour of Inyanga but the particulars of claim alleged that the purchase price was payable to the seller, Mankwe Trust and that in terms of the agreements, the seller of the shareholding was Mankwe Trust. There is no suggestion that any money was due to Inyanga and it is not suggested that Inyanga sold any shares to Southern Palace. It is thus unclear on what conceivable basis Southern Palace and Steyn would be indebted to Inyanga, as the latter is not reflected as a creditor on any of the relevant agreements. Second, the language used in the alleged guarantee is problematic in that it appears to give an undertaking to provide security for an amount in favour of Inyanga. It certainly does not undertake to pay the amount on a certain date or under certain conditions. Third, the first paragraph states that it is an unconditional guarantee to provide the necessary security but the penultimate paragraph says that it is 'subject to the conclusion as pertained in the terms and conditions of compliance being met on or before 14 March 2011'. Counsel for the respondent was unable to shed light on what this penultimate paragraph means.

[11] Another fundamental problem which relates more to the alleged indebtedness rather than the alleged guarantee, is that the particulars of claim alleged that the full purchase price of R4 million was payable on 31 October 2010, but the third agreement on which reliance was placed for the claim was only concluded on 25 February 2011. For all these highlighted reasons, Webster J erred in granting summary judgment. The

respondent's case may well be open to legitimate attack on different grounds, but most certainly a bona fide defence has been established.

[12] This then takes me to the second issue: the judgment of the full court regarding the liability of the company and its co-directors in terms of s 53 of the Companies Act, read with s 23 of the Attorneys Act. Section 53 provides:

'Memorandum may contain special conditions and may provide for unlimited liability of directors – The Memorandum of a company may, in addition to the requirements of s 52 –

a) . . . .

b) In the case of a private company, provide that the directors and past directors shall be liable *jointly and severally*, together with the company, for such debts and liabilities of the company as are or were contracted during their periods of office, in which case the said directors and past directors shall be so liable.'

Section 23 of the Attorneys Act (prior to its amendment in 2014) provides:

'Juristic person may conduct a practice

1) A private company may, notwithstanding anything to the contrary contained in this Act, conduct a practice if –

a) such company is incorporated and registered as a private company under the Companies Act, 1973 . . . with a share capital, and its memorandum of association provides that all present and past directors of the company shall be liable jointly and severally with the company for the debts and liabilities of the company contracted during their periods of office.'

[13] The legal implications of s 53 of the Companies Act and s 23 of the Attorneys Act are that they impose on directors, past and present, a statutory liability to the creditors *singuli et in solidum* for companies' debts and liabilities. They are also liable for any debts and liabilities incurred before a company's liquidation. (See *Fundtrust (Pty) Ltd (In Liquidation) v Van Deventer* 1997(1) SA 710 (A)). A creditor may pursue a claim against any one of the debtors and it remains for the debtor or debtors so sued to claim against each other a proportionate share of the debt. The effect of Webster J's order therefore was that the plaintiff could decide to enforce the court order and claim the full amount from the company only or any of the co-directors. After the company went into liquidation, the plaintiff could enforce the court order against any of the co-directors. It thus follows that each of the co-directors were well within their respective rights to approach the court, in order to appeal against Webster J's order

on any competent ground. It follows that the court a quo erred in holding that the appellants were precluded from appealing.

[14] For these reasons, both the issues on which this appeal turns must be decided in favour of the appellants, and the appeal must succeed.

[15] A further issue that troubled this court when dealing with this appeal is the unacceptable delays at different stages in the High Court. The *ex tempore* judgement by Webster J was handed down by 15 December 2011 but the signed version is dated 10 May 2012, some five months later. Leave to appeal was only granted three years later on 28 August 2015 and it took the full court seven months to hand down its judgment. The issues raised in this matter are neither novel nor complex and there is no explanation for the unreasonable delay. These delays have to be avoided because they impact on the rights of litigants to have their disputes resolved in a fair and speedy manner.

[16] I make the following order:

1 The appeal is upheld with costs of two counsel.
2 The order of the full court in the Gauteng Division of the High Court is set aside and substituted as follows:
    a. The appeal is upheld with costs of two counsel.
    b. The order of the court a quo is set aside and substituted as follows:
        i. The application for summary judgment is dismissed with costs.
        ii. The defendant is granted leave to defend the action.

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Z L L Tshiqi

Judge of Appeal

APPEARANCES

For the Appellant:	J G Cilliers SC (with S J Coetzee)
Instructed by:	Geyser & Coetzee Attorney, Centurion
	Hill Mchardy & Herbst Inc., Bloemfontein
For the Respondent:	S G Gouws (with R Raubenheimer)
Instructed by:	Louis Nel Incorporated, Pretoria
	McIntyre van der Post Attorney, Bloemfontein