ACOL CHEMICAL HOLDINGS (PVT) LTD
versus
SENZIWANI SIKHOSANA
and
FUNGAI SIKHOSANA

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 5 and 6 July 2018

Civil Trial

TS Manjengwa, for the plaintiff
T Mpofu, for the defendants

TAGU J: At the hearing of this trial Advocate *T Mpofu* for the defendants raised a preliminary point touching on the procedural irregularity that since this was a section 318 of the Companies Act [*Chapter 23.03*] matter, the matter was not properly before me because it was brought as an "Action matter" instead of an "Application matter", hence sought it to be struck of the roll. Mr *TS Manjengwa* for the plaintiff declined to have the matter struck of the roll and urged the court to proceed with the trial.

In essence the parties agreed that this was a section 318 of the Companies Act matter because in its Summary of Evidence the plaintiff averred that-

> "……..
>
> 17. Accordingly, the defendants should be liable for the Company, Plastech Designs (Pvt) Ltd's debt to the plaintiff as provided for in the Companies Act [*Chapter 24.03*]."

The facts are that the plaintiff Acol Chemical Holdings (Pvt) Ltd sued and obtained judgment against a company called Plastech Designs (Pvt) Ltd in Case No. HC 13679/12 in the sum of US$51 140.67 together with interest at 1.5% per month from the 30th of October 2012. The defendants are executive directors of the said Plastech Designs Company (Pvt) Ltd. They were not cited in case HC 13679/12. The plaintiff then failed to execute judgment against Plastech Designs (Pvt) Ltd as all the goods and equipment attached by the Deputy Sheriff and indeed all

Plastech Designs assets were claimed by a third party and the second defendant. The plaintiff is now claiming that the failure by Plastech Designs (Pvt) Ltd to pay its debts and liabilities was solely because the defendants carried on the business recklessly and with intend to defraud creditors of the company such as the plaintiff. More so in that the defendants sold all the assets and equipment of the company and paid out the proceeds of such sale to a third party called Transvale Trading CC a foreign entity. The plaintiff brought this action matter praying for an order declaring that the defendants are personally responsible for all debts and liabilities of Plastech Designs (Pvt) Ltd and that defendants jointly and severally be ordered to pay plaintiff US$51 140.67 together with interest at 1.5% per month from 30th October 2012 to the date of final payment as well as costs of suit on a legal practitioner and client scale.

Mr *T Mpofu* raised the point that this matter should have been brought as an "Application" in terms of section 318 of the Companies Act and not as "Action matter."

Section 318(1) of the Companies Act reads:-

> "If at anytime 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 Liquidators or judicial manager or any creditor of or contributory of 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 underlining and bolding is mine)

In support of his contention Mr *Mpofu* relied on three authorities. He cited the cases of *Courtesy Connection (Pvt) Ltd & Anor* v *Mupamhadzi* 2006 (1) ZLR 479 (H); *Mtetwa & Anor* v *Mupamhadzi* 2007 (1) ZLR 253 (S) and *Railings Enterprises (Pvt) Ltd T/A Paroan Trucking* v *Dowood Services (Pvt) Ltd /T/A Bradfield Motors & David Bruno Phiri Luwo & Rose Shingirai Luwo* HB-53-16.

Mr *Mpofu's* submission was that section 318 of the Companies Act provides that in a case of this nature an Application procedure should have been followed as provided for in the Statute as opposed to the Action procedure. In Courtesy *Connection (Pvt) Ltd & Anor* v *Mupamhadzi* supra, the judge in that case reiterated the position that where a Statute provides a procedure to be followed, that procedure has to be followed. It was said at p 479-

> "The right to bring an arbitral award before the High Court is not governed by the common law where the court has inherent jurisdiction to control its procedure. It is granted by statute and the powers of the court to grant that right are expressly provided for in the statute…Article 34 (1) provides that recourse to a court against an arbitral award may be made only by an application setting aside in accordance with paras (2) and (3) of this article."

The same position was later confirmed by the Supreme Court in the case of *Mtetwa & Anor* v *Mupamhandzi* supra, where the Supreme Court reiterated the same position that one cannot go outside the provisions of the Act.

Lastly, MATHONSI J in the recent case of *Railings Enterprises (Pvt) Ltd T/A Paroan Trucking* v *Dowood (Pvt) Ltd T/A Bradfield Motors & others* supra, adopted the same approach. The facts of this case that are substantially the same with the one in casu except for a few minor variations.

In the case dealt with by MATHONSI J the plaintiff in case HB-53-16 had sued the Company alone in a Trial Action to recover US$58 335.00 that had remained outstanding in case HC 499/13. The executive directors and or other partners that ran the company were not cited as parties in Case No. HC 499/13. Having obtained the judgment against the company, the applicant tried to have company property attached, only to reap a *nulla bonna* return after the executive directors who were husband and wife, as the case in this case, had divested itself of all things executable.

The applicant then brought an application in cade HC 2616/15 for an order declaring the executive directors of the company personally responsible for the debts of the company. The application was brought in terms of section 318 of the Companies Act [*Chapter 24.03*] on the basis that the directors of the company had acted fraudulently or been reckless or grossly negligent in their handling of the affairs of the company which conduct should attract personal liability.

A litany of points *in limine* were raised, two of which were as follows-

> "……
>
> 3. The remedy provided for in section 318 of the Companies Act [Chapter 24.03] is only available in respect of Companies being wound up or under judicial management.
>
> 4. There are disputes of fact in this matter which cannot be decided on affidavits. The matter should have come by Summons action."

After hearing submissions on the preliminary points MATHONSI J in dismissing all the points *in limine* had this to say –

> "I agree with Mr. Collier for the applicant that the remedy provided for in section 318 is available to any creditor of the company at anytime and must be brought by way of an application as opposed to action proceedings. That is what the section says and that is what the applicant has done."(Underlining is mine).

The judge further said –

> "The provisions of section 318 of the Act in terms of which this application is made are an embodiment of the concept of lifting the corporate veil. The court will not hesitate to visit the liabilities of the company upon a director who is using it as a front for fraud and wrong."

In response Mr *TS Manjengwa* for the plaintiff submitted without citing any authorities to the contrary that the decision in *Railing Enterprises (Pvt) Ltd T/A Paroan Trucking* v *Dowood Services* supra, referred to by Mr *T Mpofu* is not the correct position of the law. He said if it was the master or Liquidator then they are restricted to application procedure. He said there was no change in the common law but it merely adds to it. He further said the plaintiff's case is based on the "but for misrepresenting" would not have granted the facilities. He referred to the alternative claim in para 11 of the Summons and said what directs one as to procedure is whether there is dispute of facts or not. He said provisions of section 318 do not exclude "action procedure". For that proposition he said it was his own interpretation of the provision of section 318 of the Act and that he had no authorities to support that position since the point in limine was raised just before the trial without notice.

While I agree that the counsel for the plaintiff was sort of caught by surprise, the position at law is that any point of law can be raised at any point without notice.

I am persuaded to agree with Mr *T Mpofu's* submissions that a section 318 of the Companies Act case must be brought by way of Application procedure as provided for in the Statute and not by Action procedure, and only when the court finds that there are disputes of facts that cannot be resolved by affidavits but the leading of evidence the court can then direct that the application be converted to action procedure. In *casu* Mr *Mpofu* submitted that there are no disputes of facts as submitted by the counsel for the plaintiff. Whether there are disputes of facts in this matter or not is not an issue this court has been asked to decide. I have been asked to decide whether or not the case is procedurally and properly before me or not.

In adopting this stance I am guided by the authorities cited by Mr *Mpofu* which are extant. In short what MATHONSI J was saying was that in a situation where a creditor or any other person wants to have a director or past director to be declared personally liable for the debts of the

company, the request must be brought by way of an application procedure as opposed to an action procedure unless there are disputes of facts which cannot be resolved by way of affidavits but by way of evidence.

The question now is, is a party at liberty to ignore the procedure provided for in a Statute? In my view a party is expected to follow the procedure provided for in the Statute. A party may use any other procedure where the nature of the relief sought point to some other appropriate procedure to follow. In casu I have not been persuaded that the procedure adopted by the plaintiff was proper. It may have been proper if in the initial case the plaintiff had sued both the company and the defendants, and the defendants having been exonerated by the court for one reason or another that points to existence of disputes of fact. For example a pointer to dispute of facts can be gleaned from the pleas or defenses of the defendants. Or alternatively if the plaintiff had brought its case in terms of section 138 of the Act, and the defendants as respondents had in their notice of opposition raised some dispute of facts the court as I said earlier could then have directed the matter to proceed by action procedure. In casu the defendants were not cited and not heard in the initial case where the plaintiff obtained judgment against the company. For these reasons I up hold the point *in limine*. I find that the case is not properly before me and must be removed from the roll.

IT IS ORDERED THAT

(a) The preliminary point is upheld.
(b) It is declared that the case is not properly before me and is hereby removed from the roll.
(c) Each party to bear its own costs.

Wintertons , plaintiff's legal practitioners
Venturas and Samukange, defendants' legal practitioners