REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: 23870/2014

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.

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SIGNATURE **DATE**

In the matter between:

GEORGE NICHOLAS DRACOTAS	Applicant
and	
VAN DER ELST, GEORGE NICHOLAS	First Respondent
DE BRUYN , PIETER SCHALK	Second Respondent
BOKWA, IKABOTH RONNIE OLEHILE	Third Respondent
DE BRUYN VAN DER ELST AND BOKWA INC	Fourth Respondent

JUDGMENT

WINDELL J:

[1] The applicant obtained judgment against the fourth respondent, De Bruyn, Van der Elst & Bokwa Incorporated, an attorneys firm, on 8 October 2013 for an amount of R 298 935.36 plus interest. The fourth respondent has failed to pay the judgment debt or part thereof.

[2] It is common cause that the indebtedness arose from an agreement entered into between the applicant, NAMRU 89 CC and the fourth respondent. The fourth respondent was represented by one of its directors, the second respondent, Mr Pieter Schalk De Bruyn.

[3] The first and third respondents are also directors of the fourth respondent. The applicant now applies for judgment against the three directors, which judgment shall be joint and several to the judgment against the fourth respondent. The application is not opposed by the second respondent Mr Pieter Schalk De Bruyn.

[4] The applicant relies on the articles of association of the fourth respondent, section 23(1)(a) of the Attorneys Act, 52 of 1979, section 53(b) of the Companies Act, 61 of 1973 and section 19(3) of the Companies Act ,71 of 2008.

[5] Section 23 (1) (a) of the Attorneys Act, 53 of 1979 permits a private company to conduct an attorneys' practice only if the memorandum of association provides that all directors, past and present, will be jointly and severally with the company be liable for the debts of the company contracted during their periods of office.

[6] The articles of association of the fourth respondent provides as follows:

> *"Direkteure en gewese direkteure* (is) *gesamentlik en afsonderlik tesame met die maatskappy aanspreeklik vir die skulde en laste van die maatskappy wat gedurende hul ampstermyn aangegaan word of is"*

[7] The first and third respondents dispute liability on the basis that they had no knowledge of the agreement and that the debt and/or transaction had not occurred in the normal course and scope of the fourth respondent' business. They further contended that it *"should have been devoid of any shortcoming in the ethics and prohibitions of the law society, more so as the applicant is also an attorney"*

[8] The defences now raised by the directors were not raised in the main application. Applicant submitted that the respondents are not entitled to raise any defence at this stage as they should have raised it during the main application. Applicant relied on *EA Gani (Pty) Ltd v Francis 1984 (1) SA 462 (T)* and contended that the judgment against the firm is a novation of the former debt and it therefore extinguished the original obligation and created a new debt. *(novatio necessaria).* The facts of the Gani matter is the following: Gani concluded a written agreement of lease with one F (the principal debtor). On the same day Francis signed a deed of suretyship providing a continuing suretyship for all indebtedness for which the principal debtor was then or thereafter liable. Gani obtained judgment against the principal debtor under the lease and a year later instituted action against the surety. The surety then raised a plea of prescription. The court found that the judgment against the principal debtor had created an independent cause of action and that the new cause of action of indebtedness created by the judgment fell within the wide undertaking of the respondent in the deed, which had created a continuing security for all indebtedness for which the principal debtor was then, or thereafter liable to Gani.

[9] In *Trust Bank of Africa Ltd v Dhooma 1970 (3) SA 304 (N*) Fannin J came to the following conclusion at page 310 as to the effect of *novatio necessaria* .

> *"It does seem to me to be a somewhat artificial view of the position to regard a judgment as, in all circumstances, having the effect of a novation. In some cases, of course, it does have precisely that effect, where, for example, a plaintiff obtains a judgment for cancellation of a contract and for damages. Thus, in this case, had*

the judgment been one declaring the contract between the parties to have been at an end, with an order that the defendant return the vehicle to the plaintiff and pay the defendant a sum of money, it could quite realistically be said that the judgment wholly replaced and thus novated the contractual rights and liabilities of the parties inter se. But in a case like the present, where the only purpose of the judgment is to enable the plaintiff to enforce certain rights, by means of execution if need be, without in any way affecting other rights arising out of the contract, it seems more realistic to regard the judgment not as novating the former but as strengthening or reinforcing them. The right of action will have been replaced by a right to execute, but the enforceable right remains the same."

[10] The matter of *Natal Trading and Milling Co Ltd v Inglis 1925 TPD* dealt with the liability of an undisclosed principal and his agent on a contract made by the agent. Appellant sued and obtained judgment against an agent in the belief and upon the faith of his being the principal. When he subsequently discovered that the agent had acted on behalf of an undisclosed principal, the respondent, he sued the latter on the contract. It was held that appellant, having taken judgment against the agent, had exhausted his remedy, and that he could not proceed against the principal, even if the judgment remained unsatisfied. Curlewis JA stated the following at p. 743:

". . . as the liability of agent and principal is merely alternative, and not joint or joint and several, only one action can be maintained on that cause of action, and when the creditor obtains judgment in such action, the only right left to the creditor is to enforce that judgment against the judgment debtor, and, save for that, his remedy on the cause of action has been exhausted. No further action lies to him on that cause either against the agent or against the principal. This must necessarily be so, because not only is the judgment regarded in our law as a form of novation of the cause of action on which it is founded (Voet, 46.2.1.) and to that extent extinguishes or supersedes the original obligations, but if it were not so, the creditor would in effect have not an alternative remedy, against the agent and the principal, but a joint and several one."

[11] In *Swadif (Pty) Ltd v Dyke 1978(1) SA 928* Trengrove AJA considered the effect of a judgment on the original obligation of the judgement debtor and after considering the Natal Milling and Trust Bank matters, stated the following :

"*So much for the authorities and decided cases to which we have been referred. I respectfully agree with the views expressed by FANNIN, J., in Trust Bank of Africa Ltd v Dhooma, supra, in the passage quoted above. In a case like the present, where the only purpose of taking judgment was to enable the judgment creditor to enforce his right to payment of the debt under the mortgage bond, by means of execution, if need be, it seems realistic, and in accordance with the views of the Roman-Dutch writers, to regard the judgment not as novating the obligation under the bond, but rather as strengthening or reinforcing it. The right of action, as FANNIN, J., puts it, is replaced by the right to execute, but the enforceable right remains the same. Mr. Berman contended that the concept of "novation by judgment" was really an aspect of our law relating to res judicata and some support for this line of reasoning may be found in De Groot, 3.49.1, Voet, 42.1.2, 42.1.29, 30, 31 and 32; De Wet and Yeats, op. cit., p. 216, and Caney, op. cit., pp. 69-70. On this approach to the nature and effect of novatio necessaria, one can understand why a plaintiff, who has a judgment for specific performance in his favour, is not precluded from suing in another action for cancellation and damages, in lieu of the decree of specific performance. (Ras and Others v Simpson,1904 T.S 254 at p 256; Evans v. Hart, 1949 (4) S.A. 30 (C) at pp. 35-37; Nieuwoudt, N.O., and Another v . Els, 1953 (3) S.A. 642 (O) at pp. 644-645.)*

[12] The facts of the Gani matter can be distinguished from the facts *in casu*. The applicant *in casu* applies for judgment against the respondents based on their liability as co debtors. It is not necessary under these circumstances to introduce the concept of novation.

[13] Applicant also contended that the judgment of the court in the main application is *res judicata*. It was contended that the requirement that the prior action be between the same parties does not mean the identical parties but also persons who are in law identified with those who were parties in the proceedings. Referring to *Man Truck and Bus (SA) (Ltd) v Dusbus Leasing CC and Others 2004(1) SA 454 (W)* it was submitted that there was sufficient privity of interest between the firm and the directors to uphold a plea of res judicata.

[14] In *Caesarstone Sdot-Yam Ltd v World of Marble and Granite 2000 CC and Others* 2013(6) SA 499 (SCA) Wallis JA held the following at par [43]:

"It may be that the requirement of the 'same persons' is not confined to cases where there is an identity of persons, or where one of the litigants is a privy of a party to the other litigation, deriving their rights from that other person. Subject to the person concerned having had a fair opportunity to participate in the initial litigation where the relevant issue was litigated and decided, there seems to me to be something odd in permitting that person to demand that the issue be litigated all over again with the same witnesses and the same evidence in the hope of a different outcome, merely because there is some difference in the identity of the other litigating party."

[15] The directors and more specifically, the first and third respondents were not parties in the proceedings against the fourth respondent. There is no indication that they were even aware of the proceedings instituted against the firm. The only director that was involved in the proceedings in the main application was the second respondent, Mr De Bruyn. He opposed the application on behalf of the fourth respondent and deposed of the answering affidavit.

[16] Section 53(b) of the Companies Act provides that:

"(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." [Emphasis added]

[17] In *Maritz and Another v Maritz & Pieterse Inc (In Liquidation) 2006 (3) SA 481,* Heher JA considered the history of s 53(b) of the Companies Act and its application to professional companies . With reference to *Fundstrust (Pty) Ltd (in Liquidation) v Van Deventer 1997 (1) SA 710 (A)* he found that the protection provided by the section was directed at the company's creditors. Heher JA stated that the effect of the section is to render the directors co-debtors with the company, conferring on the creditors an

independent right of action against the directors and the effect of including the statement in the memorandum is twofold: creditors are able to hold the directors liable *singuli et in solidum* for company debts and liabilities, and if a director pays any of the company debts, he has a right of recourse against his fellow directors for their proportionate shares.

[18] *Res judicata* is a special plea pleaded by a party who is able to show that the point in dispute has been adjudicated upon already between the parties. Under the circumstances of this case it is clear that in the present circumstances a plea of *res judicata* could not be successfully raised.

[19] The directors are co- debtors and are in light of the circumstances entitled to oppose this application and to raise defences not previously raised or decided upon by the court in the main application. The question now arises whether the defences now raised by the directors are legally sound and if they have any merit.

[20] The *Fundstrust* case concerned the relationship between a stockbroker and an investor. The court held that the investor is entitled to recover ". . . *any loss which the latter might suffer as a result of his broker's fraudulent or negligent conduct, . . . by way of a contractual action and the directors would be liable".* Hefer JA held that the word "contracted" in section 53 refers only to contractual debts and liabilities of a company. The learned Judge held that this limited interpretation of the word "contracted" will not lead to the anomalous result that directors would be liable for a contractual debt owed to the company's creditors but not for monies stolen from such creditors. Hefer JA dealt with section 6A of the Companies Amendment 62 of 1968, the precursor to section 53(b) of the Companies Act and stated as follows:

> "*It is clear that Parliament intended to impose on them an entirely new statutory liability and to provide creditors with an entirely new remedy not hitherto available to them which would enable them to hold the directors liable singuli et in solidum for company debts and liabilities before the company's liquidation."*

[21] The first issue is whether the applicant is a creditor of the first respondent;

secondly, whether that relationship is contractual. It is undisputed that the firm is liable to the applicant. It is undisputed that the liability arises from a contract entered into between the applicant and the fourth respondent. The first, second and third respondents are directors of the firm and are as co debtors liable for the debts of the company. They cannot escape liability merely because they did not have any knowledge of the agreement. Their ignorance provides no defence to their personal liability in terms of section 53(b) of the Companies Act. In terms of the articles of association the directors are liable for *"die skulde en laste van die maatskappy."* In terms of section 53 (b) the directors are liable (as co debtors) *"or such debts and liabilities of the company as are or were contracted during their periods of office".* There is no evidence that the debt had not occurred in the normal course and scope of the firm's business, but, it is in any event, in my view, irrelevant. The directors are co debtors. To interpret s 23(1)*(a)* of the Attorneys Act and section 53(b) of the Companies Act as to make only provision for certain contracts as this case shows, would bring about consequences directly opposed to the legislative intention. The creditors of a professional company would be deprived of the very assurance that the section sets out to provide, which is the right to claim in full from the directors. See *Maritz and Another v Maritz & Pieterse Inc. (In Liquidation)* supra.

[22] There is further no factual basis for the allegation of touting. The nature of the applicant's claim against the first respondent is based in contract and the applicant is a creditor of the fourth respondent. I am accordingly satisfied that there are no merits in any of the defences set out in the answering affidavit.

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

21.1. Judgment is granted against the first second and third respondents which judgment shall be joint and several to the judgment against De Bruyn Van Der Elst and Bokwa Incorporated under case number 42153/2012 for :

a) Payment of the sum of R 298 935.36

b) Interest on the aforesaid amount at the rate of 15,5% per annum

as from 12 September 2012 to date of payment.

c) Cost of the application.

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L.WINDELL

Judge of the South Gauteng High Court

Counsel for applicant : Adv Smit

Counsel for respondent : Adv. Groenewald

Date of hearing : 9 March 2015

Date of judgment : 13 March 2015