SUPREME COURT OF SEYCHELLES

Reportable
MA33/2020
MA406/2019
Arising in MC85/2016
SCSC.702

In re:

IN THE MATTER OF THE COMPANIES ACT, 1972 AND THE INSOLVENCY ACT 2013

And

IN THE MATTER OF EDEN ENTERTAINMENT (PROPRIETARY) LIMITED (IN LIQUIDATION) HEREIN REPRESENTED BY ITS LIQUIDATOR, RAJESH MATHUR

EDEN ISLAND RETAIL CENTRE (SEYCHELLES) LIMITED **APPLICANT**
(rep. by Bernard Georges)

and

IN THE MATTER OF EDEN ENTERTAINMENT (PTY) LIMITED **DEFENDANT**
(rep. by Manuella Parmantier)

Neutral Citation:	*EIRCL V EEPL* (MA 33/2020, MA406 2019) [2023] SCSC 702 8 September 2023
Before:	Dodin J
Heard:	8 April, 23 May 2022 and written submissions.
Delivered:	8 September 2023

RULING

DODIN J

Introduction

[1] Eden Island Retail Centre (Seychelles) Limited ("EIRCL") is the owner of the Eden Plaza, Eden Island and landlord of premises leased by Eden Entertainment (Pty) Limited

("EEPL") in Eden Plaza for the purposes of carrying of the business of casino. EEPL went into liquidation on the 4th May 2016 and the company is still in the process of winding up. The last two directors of EEPL were Allan Ernestine and Marie-Alise Ernestine.

[2] The liquidator of EEPL, Rajesh Mathur, applied to the Court for direction on the distribution of the realizable assets of the company since the realizable assets of the company EEPL amounts to SCR 1,331,000 whilst the total debt of the company EEPL amounts to SCR 17,901,356.

[3] Before the Court could make a determination on the application for direction, EIRCL sought in an application to Court to render last directors of EEPL personally liable for all the debts and liabilities of EEPL for reasons that would be referred to later in this ruling, to which the directors objected. It was agreed that the Court would determine the application made by EIRCL before hearing and determining the application for direction by the liquidator.

Evidence

[4] The Applicant's witness, Aarti Kerai, a director of EIRCL testified that it was a Mr Lesperence who signed the lease agreement with EIRCL on 7th December, 2012. Following the signing, rent and services charges were not being paid promptly and the lessee fell into arrears. Attempts made to recover the arrears were unsuccessful until the lessee company went into liquidation. She was never officially informed that Mr and Mrs Ernestine had taken over the company but admitted that emails were in fact sent to Mr and Mrs Ernestine highlighting to them the outstanding arrears.

[5] The witness further testified that negotiations were held with Mr Ernestine to lower the rent but that the rent would not be lowered until the arrears had been settled. When the arrears were not settled, EIRCL filed for ejectment in the Rent Board and blocked entry to the premises. Subsequently, EEPL filed for reduction of rent before the Rent Board which gave judgment in favour of EEPL but still the reduced rent were not paid. Hence EIRCL repossessed the property.

[6] The Respondent's witness, Allen Ernestine, testified that when the lease was signed, neither himself nor his wife were directors or members of the company EEPL. They became directors on 18th September, 2013. At the time the casino was set up but not operating. When they became directors they negotiated with EIRCL for reduction of rent but rent was reduced minutely which made it impossible to cover actual rent and arrears. In addition, during operating hours, the lift, air-conditions and the lights were switched off and when they enquired why, they were told that they had not paid the rental. When they closed for renovations, EIRCL put up notices stating that the place has been closed and broke the key inside the keyhole so as to block entry. He denied EEPL acted recklessly, negligently or fraudulently.

Synopsis of submissions

[7] Learned counsel for the Applicant and Respondent made lengthy submissions in support of their party's respective case. The main argument posited by the Applicant is that the directors of EEPL, Mr Allan Ernestine and Mrs Mary-Alise Ernestine, carried out the company's business with reckless disregard of the company's obligation to pay its rent to the Applicant. It is also the contention of the Applicant that the directors carried out the company's business with reckless disregard of the insufficiency of the company's assets to satisfy its rent obligations.

[8] The Respondents to the Application, Mr Allan Ernestine and Mrs Mary-Alise Ernestine, resist the application. The main arguments advanced by the Respondents is that there were genuine and good faith negotiations with the Applicant to obtain a reduction in rent. The negotiations bore no positive results for the Respondents. From this, it is their contention that there were reasonable prospects of the company remaining solvent had it not been for the malicious manoeuvers of the Applicant which in turn forced EEPL into liquidation.

[9] Learned counsel for the Applicant, submits that the intent of the law under Section 196 (1) (b) and (c) is to ensure creditors will not suffer for the reckless trading of directors of companies. He further submits that a similar provision is found under Section 424 (1) of

the South African Companies Act 1973. In so doing, Counsel has directed the Court to the cases of *Pressma Services (Pty) Ltd v Schuttler and Another 1990 (2) SA 411 (C) 419*; *Ex parte Lebowa Development Corporation Ltd 1989 (3) SA 71 (T)*; *Ozinky No v Lloyd and Others [1992] (3) SA 396*; *Strut Ahead Natal v Burns 2007 3 All SA 190 (D)*; *M A Vleisagentskap CC & Another v Shaw [2003] (6) SA 714*; *Fourie NO and Others v Newton [2011] 2 All SA 256 (SCA).*

[10] It is the submission of the Applicant that the Respondents are seasoned business people with long successful business careers. However, in allowing EEPL to trade until its premises were repossessed by the Applicant Company was reckless. That in the circumstances, they knew that it was unlikely that EEPL would be able to pay rent which was accumulating every month. It is the further submission of the Applicant that throughout the whole of 2014 and 2015, EEPL continued to operate in the premises of the Applicant without paying any rent whatsoever. That while there were negotiations to reduce rent and further on application to the Rent Board which was granted, EEPL operated by the Respondents at the time, never paid any amount towards the said rent.

[11] The Respondents submitted jointly through their learned counsel. It is the submission of the Respondents that the Application and evidence by the Applicant is inconsistent on the material issues. Further to this, it is the submission of the Respondents that the Applicant has failed to prove any one of the circumstances in which liability for fraudulent trading may be triggered.

[12] Further, as stated above, one of the arguments of the Respondents is that the actions of the Applicant led to the closure of business of EEPL. Moreover, the evidence tendered in this case shows that the present Application is not made for the benefit of the creditors of EEPL but only for the 'landlord'.

[13] The Respondents relied on a number of cases as authorities which lay out some important principles for courts to be guided by. These include *Re White & Osmond (Parkstone) Ltd*; *Morphitis v Bernasconi [2003] 2 BCLC 53*; *Morris v Bank of India [2005] BCC 739*. They mostly refer to the United Kingdom courts making a determination of fraudulent trading under Section 213 of the UK IA 1986. I note that fraudulent trading in respect of 'intent to

defraud' is different from 'reckless disregard' under Section 169 (1) (b) and (c) of the IA 2013.

Locus standi

[14] In this case, it is the lessor of the premises who has brought this matter to Court as a creditor on account of the Respondent not having paid rent and other charges due as part of the lease agreement. The Respondents stance is that the Applicants are not creditors but "landlord" and presumably does not fall within the select persons able to make an application to Court under section 169 of the Insolvency Act. The Insolvency Act does not define a "creditor" but section 2 gives the following definition of debtor:

> *"debtor" means—(a)a person against whom a bankruptcy petition has been filed under Part II; or*
>
> *(b)a company in the course of being wound up by the Court or by way of creditors' voluntary winding up;"*

[15] The Meriam-Webster dictionary defines creditor as:

> *" a person to whom a debt is owed*
> *especially : a person to whom money or goods are due".*

The Applicant clearly falls within the definition of a legal person to whom money is due under the lease agreement by EEPL. Therefore I can conclude that the Applicant, being the landlord, is not precluded from making this application under section 169 of the Insolvency Act.

The law.

[16] One of the circumstances where directors can be made personally liable is where 'fraudulent trading' is proven. Fraudulent trading can be found in three instances as listed in Section 169 (1) of the Insolvency Act of 2013 (hereinafter referred to as 'IA 2013').

> *"169(1)If in the course of the winding up of a company it appears that any business of the company has been carried on—(a)with intent to defraud creditors of the company or the creditors of any other person, or for any fraudulent purpose; or*
>
> *(b)with reckless disregard of the company's obligation to pay its debts and liabilities; or*
>
> *(c)with reckless disregard of the insufficiency of the company's assets to satisfy its debts and liabilities,*
>
> *the court, on the application of the Official Receiver or the liquidator or any creditor, shareholder, contributory or debenture holder of the company, may, if it thinks it proper, declare that any of the directors or officers, whether past or present, of the company, or any other persons who were knowingly parties to the carrying on of the business in manner stated in paragraphs (a) to (c), shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the court may direct, and may order the amount of such debts or other liabilities to be paid to the persons to whom they are respectively owed or to the liquidator for the benefit of the creditors of the company generally."*

Directors could therefore be liable when a company is in liquidation provided that such an action is taken by the Official Receiver or the liquidator or any creditor, shareholder, contributory or debenture holder of the company as Section 169 (1) provides.

[17] Legal writer Paul L. Davies in *Gower and Davies Principles of Modern Company Law* (2008) 8th Edition argues that the genesis of the notion of fraudulent trading in the UK at page 215 thus:

> *"An example of far greater practical importance has long been afforded by provisions on fraudulent trading. These provisions recognise that the separate legal entity and limited liability doctrines are capable of being abused and that the benefit of them should be removed from the abusers."*

[18] Similarly, Alan Dignam and John Lowry in their book *Company Law* (2016) 9th Edition state at page 454, that:

> *"...a director will not be able to hide behind the corporate veil and avoid personal liability for the company's debt where he has used the company for fraudulent trading..."*

It is now trite law that the deterrence of fraudulent trading is necessary to curtail abuse of the concept of separate legal entity and hold directors accountable for debts incurred by the company in the instance where the same is as a result of fraudulent or wrongful trading.

[19] The provision on fraudulent trading in the UK Insolvency Act of 1986 (hereinafter referred to as ' UK IA 1986') reads as follows:

> *"213(1) If in the course of the winding up of a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person, or for any fraudulent purpose, the following has effect..."*

This is similar to the wording in Section 169 (1) (a) of the IA 2013 and therefore this Court can be guided by the jurisprudence of the UK in this regard.

[20] It is trite law that fraud carries a higher degree of proof than the ordinary 'balance of probabilities' in civil proceedings, but also lower that 'beyond reasonable doubt' in criminal proceedings (see *Bason v Bason (2005) SLR 129*). Fraud must be proved by producing positive evidence before the Court as illustrated in the case of *Houareau v*

Houareau (2011) SLR 47 and the burden of proving fraud lies on the party alleging the same (see the case of *Michel v Standard Bank (1983) SLR 198*). Therefore any party (mainly, the Official Receiver or the liquidator or any creditor, shareholder, contributory or debenture holder of the company as provided by the IA 2013) approaching the courts on this provision must meet the standard of proof expected to prove fraud.

[21] In order to prove the existence of fraud, the Applicant must prove that the Respondents had 'knowledge' as one of the element for a successful suit under Section 169 (1) (a) of the IA 2013. If the evidence establishes that the directors had knowledge or knowingly acted in the manner alleged then the basis for fraudulent conduct would have been laid. In *Re William C Leitch Brothers Ltd (1932)*, Maugham J made the following pertinent observations:

> *"..if a company continues to carry on business and to incur debts at a time when there is to the knowledge of the directors no reasonable prospect of the creditors ever receiving payment of those debts, it is, in general, a proper inference that the company is carrying out business with the intent to defraud..."*

[22] In the UK case of *Re Patrick & Lyon Ltd [1933] Ch 786* the same Maugham J stated:

> *"I will express the opinion that the words 'defraud' and 'fraudulent purpose,' ... are words which connote actual dishonesty involving, according to current notions of fair trading among commercial men, real moral blame."*

Therefore a court deciding on 'intent to defraud' has to be satisfied on the standard of proof required, that the directors were in fact dishonest in their trading and had the intention to defraud creditors.

[23] Another instance of fraudulent trading is provided by Section 169 (1) (b) and (c) of the IA 2013 is where the director must have operated the business with 'reckless disregard' of the company's obligation to pay its debts and liabilities or of the insufficiency of the company's assets to satisfy its debts and liabilities. Since there is no element of fraud here, the standard of proof for Section 169 (1) (b) and (c) is on a balance of probabilities.

[24] The South African Companies Act 61 of 1973 (hereinafter referred to as Companies Act 1973) also provides for conduct by directors which is 'reckless', and this is in Section 424 (1) which reads as follows:

> *"When it appears, whether it be in a winding-up, judicial management or otherwise, that any business of the company was or is being carried on recklessly or with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the Court may, on the application of the Master, the liquidator, the judicial manager, any creditor or member or contributory of the company, declare that any person who was knowingly a party to the carrying on of the business in the manner aforesaid, shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court may direct."*

In essence, Section 424 (1) of the Companies Act 1973 is recourse for creditors who have suffered loss as a result of reckless carrying out of the business by directors of the company undergoing liquidation. This too is similar to what Section 169 (1) (b) and (c) of the IA 2013 provides in so far as making it possible for creditors to claim against directors who had a reckless disregard of the debts and other monetary obligations.

Analysis

[25] There is no doubt that the Applicant can make such an application given their creditor status as has been found above. What this Court to determine based on the evidence adduced, is whether the directors committed fraud on the creditors or acted fraudulently in their conduct of business whilst the company was winding up or whether the directors carried out the company's business with reckless disregard of the obligations to pay rent and a reckless disregard of the insufficiency of the company's assets to satisfy the said rent obligations.

[26] While the Respondents may be correct on principle in respect of the standard of proof for 'intent to defraud', this does not assist their arguments in the present case because what was pleaded by the Applicant is 'reckless disregard' under Section 169 (1) (b) and (c) of the IA 2013, the standard of proof of which is 'on a balance of probabilities'. As such the

authorities provided by the Respondent in support of their defence are of little help to the Court.

[27] To conclude whether the directors have conducted business with reckless disregard, this Court draws some guidance from an explanation of what 'reckless' means in Section 424 of the Companies Act 1973 by Professor MS Blackman and others in *Commentary on the Companies Act (Blackman)* (2012) p. 534 which states as follows:

> *"In the context of s 424 'recklessly' is used in contradistinction to the term 'fraudulently.' Recklessness' in this context is a serious departure from the standard of care that would be observed by a reasonable businessman in conducting the company's business in similar circumstances. It connotes not mere negligence but at the very least gross negligence or culpa lata; and it is not limited to dolus eventualis, ie it covers gross negligence without conscious or wilful or wanton disregard of the consequences or risk-taking. Gross negligence includes an attitude or state of mind characterised by 'an entire failure to give consideration to the consequences of one's actions in other words, an attitude of reckless disregard of such consequence'. Thus, the concept of 'recklessness' entails 'the involvement of risk, whether or not the doer realises it'."* [footnotes omitted]

[28] Blackman *et al* (supra) further state at pp. 534 – 535:

> *The 'test for recklessness is objective insofar as the defendant's actions are measured against the standard of conduct of the notional reasonable person'. A director's honest belief as to the prospects of payment of a claim when due, 'while critical in a case of alleged fraudulent trading, is not in itself the determinant of whether he was reckless, for '[i]t will be irrelevant if a reasonable person of business in the same circumstances would not have held that belief'. Although there may also be a subjective element present if the defendant is conscious of the risk-taking, that 'is not an essential component of recklessness and its existence is no impediment to the application of the objective test', for 'risk-consciousness in the realm of*

recklessness does not amount to or include that foresight of the consequences which is necessary for dolus eventualis'.

The test is however 'subjective in so far as one has to postulate that notional being as belonging to the same group or class as the defendant, moving in the same sphere and having the same knowledge or means to knowledge'. This subjective consideration 'requires that regard should also be had to any additional knowledge, experience or qualification that the evidence reveals that director to possess and which is relevant to the question whether recklessness has been proved'. [footnotes omitted]

[29] The South Africa Supreme Court of Appeal in *Ebrahim and Another v Airports Cold Storage (Pty) Ltd (485/2007) [2008] ZASCA 113* at para [14] defined reckless under Section 424 as follows:

> *"Acting 'recklessly' consists in 'an entire failure to give consideration to the consequences of one's actions, in other words, an attitude of reckless disregard of such consequences'. In applying the recklessness test to the running of a closed corporation, the Court should have regard to amongst other things the corporation's scope of operations, the members' roles, functions and powers, the amount of the debts, the extent of the financial difficulties and the prospects of recovery, plus the particular circumstances of the claim 'and the extent to which the [member] has departed from the standards of a reasonable man in regard thereto'."* [footnotes omitted]

[30] Further to the above, the court in Triptomia Twee (Pty) Ltd & Others v Connolly & Another 2003 (4) SA 558 (C) held that in determining whether the respondent has behaved recklessly:

> *'the scope of the operations of the company, the functions and powers of the director, the range of his or her responsibility, his or her background and knowledge and expertise, are all relevant in examining the director's*

conduct. Within the context of this test it is well to remember having regard to the complexities of a large business organization, that a director may properly leave certain tasks to a competent official who, in the absence of any reasonable ground for suspicion, can be trusted to perform such a duty honestly.'

[31] In essence, when deciding whether there was recklessness on part of the Directors of the company to warrant personal liability, the Court has to take into account three things which are intrinsically interrelated. Firstly, it would be whether the Director was grossly negligent in conducting business taking into account the functions, powers and range of responsibilities of the Director under the company; secondly, the conduct must be understood against the Director's background, knowledge and expertise and thirdly, whether such actions can be reasonably said to have been taken with an entire failure to give consideration to the consequence.

[32] The evidence of the Applicant in the present case is that between the year 2013 and 2015, the Respondents as directors of EEPL failed to honour rental obligations emanating from an agreement of lease dated 7 December 2012. This has resulted in a debt of US$ 624,517.50. It is also the evidence of the Applicant that the Respondents also failed to honour and utility obligations which has accumulated to SCR 995,018.97.

[33] On the other hand, the Respondents argue in part, that the profitability of EEPL was limited by the actions of the Applicant. These actions include the exorbitant rent which they refused to re-negotiate on occasion; the switching off of lights in the corridor leading to EEPL shortly after 8.30pm; switching off the lift that went up to EEPL; and, switching off the air conditioning system. That because it as EEPL was a casino business, the customers would only come in the evening well after 10 pm. As such, a combination of the lift not working, the lights switched off and no air conditioning was one which deterred customers and affected profitability. Profitability was so low that the staff of EEPL had to be reduced from approximately 75 to 40 people.

[34] It is noted that in cross-examination, Mr Ernestine admitted that he had been a successful businessman for several decades. However he testified that although he had bought into

EEPL, he did not read the lease it had with the Applicant. Furthermore, Mr Ernestine does not recall which months in 2013 was rent due and paid towards the Applicant. It was also the evidence of the Respondents that they were never issued with original utility bills from PUC but rather, all bills came through the Applicant. On this evidence in addition to the evidence of the Applicant rehearsed above, the Court has to determine whether the Respondents carried out the business with a reckless disregard of the creditors of the company.

[35] It is perplexing that a Director of a company would be conducting business without any knowledge of the lease of the said business and would be unaware of the extent of rental obligations and when such obligations were met or otherwise. However, I find from the evidence that EEPL, faced with what the Respondents considered to be exorbitant rent, took steps to mitigate or reduce the rent. The Respondents tried to negotiate the rent but this was unsuccessful. They eventually went to the Rent Board, but only after the Applicant had moved for ejectment. Nevertheless, the perplexing context of this case is that the Applicant's witness also testified that she was not aware that the Ernestines were the new owners of EEPL. This begs the question of with whom or how were negotiations being conducted.

[36] The Respondents also maintained that he was unaware of which months the rental obligations of Eden Entertainment Ltd were met or defaulted. As Directors, the Respondents should have been privy to the company's financial statements which record the company's activities and performance. Such activities include rental obligations. For a Director to run a business and compile financial statements without knowledge of the company's obligations including rental obligations arising out of a valid lease shows that the Director was indifferent to such legal obligations which could amount to gross negligent in the manner in which he was carrying out the business of the company. The same applies to the utility bills and charges.

[37] Although this is not a matter of equity but a matter of law, the Court cannot turn a blind eye to the actions of the Applicant in aggravating the predicament of the Respondent. The switching off of lights in the corridor leading to Eden Entertainment Ltd shortly after

8.30pm; switching off the lift that went up to Eden Entertainment Ltd and switching off the air conditioning system would without doubt limit the operations and success of the Respondents business from which the funds were to be obtained to meet EEPL's obligations. Further, the fact that the Rent Board agreed with the Respondent that the rental had to be lowered seems to vindicate the Respondents contention that all attempts to bring the business towards profitability were frustrated rather than just a result of his business management.

[38] The third and final consideration is whether such actions can be reasonably said to have been taken with an entire failure to give consideration to the consequence. Against the background of a poorly performing company, failure to meet rental obligations, or at the very least, pursuing the recourse under the law before the Rent Board, it can be said that the Respondents gave some consideration to the consequence of conducting the business in the state he purchased it and the effect on the creditors. It was also not disputed that the Respondents in an effort to salvage the business, reduced the number of staff from 76 to 40 in an efforts to avoid liquidation.

Final determination

[39] Having considered all the above, I find that although the Respondent contributed to some extent to increase the debt of EEPL during the winding up process, the actions of the Applicant also contributed significantly towards making already a bad situation worse. Justice would not be served if a participant in an objectionable act then seek to benefit from that act through the Court. I cannot therefore conclude on the balance of probabilities that it was only the running of the business during the winding up that created the debt and that it was solely a deliberate or reckless attempt by the Respondents which was to the detriment of the creditors. Further, although the Respondent's directors could have done more to meet EEPL's obligations, it did the bare minimum sufficient to absolve the directors from being declared personally liable for the debt of EEPL.

[40] Consequently, this Application to declare the directors of EEPL personally liable for the debt of EEPL is dismissed.

[41] I make no order for costs.

Signed, dated and delivered at Ile du Port on 8th day of September 2023.

G. Dodin

Judge