

EXPORT CREDIT GUARANTEE CORPORATION OF ZIMBABWE  
versus  
MANSON HLERE  
and  
GERMAN CONSTRUCTION (PVT) LTD

HIGH COURT OF ZIMBABWE  
COMMERCIAL DIVISION  
MANZUNZU J  
HARARE, 27 & 31 January 2025

## **COURT APPLICATION**

*P Mujegu*, for the applicant  
*A Nyamukondiwa*, for the respondent

MANZUNZU J

## **INTRODUCTION**

This is a court application for a declaratur in terms of section 68 (1) and (3) of the Companies and Other Business Entities Act [Chapter 24:31] (the Act) as read with section 14 of the High Court Act [Chapter 7:06] in which the applicant seeks an order against the 1<sup>st</sup> respondent in the following terms;

“1. The 1st Respondent be and is hereby declared personally liable without limitation for payment of the debt owed by the 2nd Respondent to the Applicant.

2. That the 1st Respondent pays the Applicant the sum of US\$106 207-51 [One Hundred and Six Thousand Two Hundred and Seven United States Dollars Fifty-One Cents] being the judgement debt owed by the 2nd Respondent.

3. Interest on the above amounts be payable by the 1st Respondent at the prescribed rate calculated from the date of default to the date of full and final payment.

4. A certain piece of land being Stand 1369 Mateta Road, Gokwe South, Zimbabwe be and is hereby specially executable.

5. The Respondent be and is hereby ordered to pay the costs of this application on a legal practitioner and client scale.”

The 1<sup>st</sup> respondent has opposed the application.

## **BACKGROUND**

The background to this application is mainly common cause.

(1) The 1<sup>st</sup> respondent is a director in the 2<sup>nd</sup> respondent.

- (2) On 25 October 2023 a judgment was granted in favour of the applicant as against the 2<sup>nd</sup> respondent in case number HCHC 500/23 for the payment of US\$106 207.51.
- (3) The judgment debt remains unsatisfied.
- (4) This prompted the applicant to bring the current application in terms of section 68 of the Act.
- (5) In a brief founding affidavit, the applicant lays out the essence of this application thus;

“..... The factual matrix of the 2<sup>nd</sup> Respondent’s default is more fully canvassed in the referred matter under HCHC 500/23 whose record I beg leave to incorporate herein... The 1st Respondent in particular was a knowing party to the reckless and grossly negligent manner in which the business of the 2<sup>nd</sup> Respondent was run. The 2nd Respondent received the advanced amounts and despite discounting the work already done on the project from the amounts advanced, the 2<sup>nd</sup> Respondent has failed to account for the rest of the amount as it has not been returned neither to the UNOPS nor to the Applicant...It is clear that the judgement debt herein is a consequence of the 1st Respondent’s reckless and grossly negligent nature. The 1st Respondent ought to be visited with such liability upon his assets...”
- (6) The 1<sup>st</sup> respondent denied that the 2<sup>nd</sup> respondent was run in a reckless and negligent manner. He stated as part of his opposing affidavit that; “The business of the 2nd Respondent was carried on out with the concern of prosperity of the business. The failure to fulfil some of the obligations was not due to the reckless trading but to unforeseen global supply chain disruptions which had an adverse effect on the 2nd Respondent business such disruptions could not have been predicted by any reasonable businessman. Additionally, the 1st Respondent never acted negligently in his involvement with the affairs of the company...”

## THE LAW

The relevant parts of Section 68 (1) and (3) of the Act upon which this application was brought reads;

**“68 Fraudulent, reckless or grossly negligent conduct of business**

- (1) A creditor, ... of a company or private business corporation may, in an action instituted in the High Court, seek a declaration in terms of subsection (3).
  - (2) ...
  - (3) If it appears to a court that any business of a company or private business corporation was or is 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 declare that—
      - (d) 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 such manner or in such circumstances; or
      - (e) any person who was knowingly a party to the carrying on of business of the private business corporation in such manner or in such circumstances;
- (hereinafter called an “impugned person”) shall be personally responsible, without limitation of liability, for all or any of the debts or other liabilities of the company or private business 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 the liability, including an order under subsection (4).”

What constitutes reckless and gross negligence was decided in the case of *Chibwe t/a as Ross Motors (Private) Limited v Fawcett, Security Operations (Private) Limited & Anor* HH 79/2006 where Bhunu J (as he then was) cited with approval the remarks in *Rosenthal v Marks* 1944 TPD 172 that;

“Gross negligence (*culpa lata crassa*) connotes recklessness or entire failure to give consideration to the consequences of his action a total disregard of duty.”

In *Shawinigan v Vokins and Co Ltd* [1961] 3 ALL ER 396 at 403 F it was said that;

"recklessly" means "grossly careless" and that recklessness is — "gross carelessness - the doing of something which in fact, involves a risk, whether the doer realises it or not; and the risk being such, having regard to all the circumstances, that the taking of that risk would be described as 'reckless' "

The Oxford dictionary defines gross negligence as, “A high degree of negligence, manifested in behaviour substantially worse than that of the average reasonable man” and the Cambridge dictionary says its; “a very serious failure to take care or to do what is your legal duty, which is much worse or more extreme than anything an average person.”

The test to establish recklessness or gross negligence is objective in that it looks at the action of the 1<sup>st</sup> Respondent conduct against the standard of conduct expected of a reasonable director in the running of the company.

#### BURDEN OF PROOF

The onus is on the applicant to prove on a balance of probabilities that;

- a) The 2<sup>nd</sup> respondent was run recklessly or grossly negligent or with intent to defraud. These are disjunctive factors, proof of any one of them will suffice.
- b) Liability attaches to any director who had knowledge that 2<sup>nd</sup> respondent was being run as such or who was a party in the running of the business in such manner.

#### **WAS THE BUSINESS OF THE 2ND RESPONDENT CARRIED OUT IN A RECKLESS OR NEGLIGENT OR FRAUDULENT MANNER?**

There is no fraud alleged by the applicant in the founding affidavit. What is alleged is that the 2<sup>nd</sup> respondent was run in a reckless and grossly negligent manner. The question which must be answered is; what is the evidentiary basis for that?

Whether or not the 2<sup>nd</sup> respondent was run recklessly or negligently is dependent upon the circumstances of this case, in particular the undisputed facts laid out in case number HCHC 500/24. The facts are that;

- (1) On 19 July 2022 the applicant issued an advance payment guarantee and performance guarantee to the 2<sup>nd</sup> respondent in favour of the United Nations Office for Project Services (UNOPS) in connection with the supply, construction, commissioning, testing and completion of construction of schools in Chimanimani district.
- (2) The 2<sup>nd</sup> respondent, despite receipt of the money, failed to deliver the project in accordance with the terms and conditions of the contract, neither did it account for the money received.
- (3) The applicant met the 2<sup>nd</sup> respondent's obligations to pay UNOPS but then made a similar demand to the 2<sup>nd</sup> respondent.
- (4) On 11 July 2023 the 2<sup>nd</sup> respondent, in a letter authored by the 1<sup>st</sup> respondent in his capacity as managing director, to the applicant proposed a payment plan which was not acceptable to the applicant.

It was argued for the applicant that part of the evidence to prove recklessness and gross negligence is that;

- a) there was a debt which existed prior to the granting by this court of a judgment debt in HCHC500/23;
- b) the fact that the 2<sup>nd</sup> Respondent through the 1<sup>st</sup> Respondent accepted the payment of money but failed to render the corresponding services when the money had been paid on the strength that the 2<sup>nd</sup> Respondent had the capacity to render such services;
- c) that despite acknowledging the debt the 2<sup>nd</sup> Respondent through the 1<sup>st</sup> Respondent failed to make any payment to liquidate the said debt;
- d) the 2<sup>nd</sup> Respondent is no longer operating.

On the other hand it was argued for the 1<sup>st</sup> respondent that;

- a) the fact that a business has incurred debts is itself is not conclusive proof that the company was being run recklessly or negligently, what is important is the factual matrix surrounding the debt.
- b) it was argued risk and debt do not automatically mean that the business was being run in a reckless and negligent manner.
- c) the 1<sup>st</sup> respondent was not the only director of the 2<sup>nd</sup> respondent.
- d) The letter proposing a payment plan was done on a "without prejudice" basis.

- e) the order sought to declare the 1<sup>st</sup> respondent's property specially executable had no legal basis.

### *Analysis*

The conclusion that the 2<sup>nd</sup> respondent was run in a reckless and grossly negligent manner cannot be escaped. The 2<sup>nd</sup> respondent was construction company which entered into an agreement to do that which it professed was competent to do. On the strength of that it received money to do a project it undertook to do. The project failed and the money could not be accounted for. The 2<sup>nd</sup> respondent has even stopped operating.

What explanation is there to controvert the inference of recklessness and gross negligence. The brief explanation by the 1<sup>st</sup> respondent is that some of the failures were caused by unforeseen global supply chain disruptions. If this were true then 2<sup>nd</sup> respondent ought to have defended the matter in HCHC 500/23. The applicant has proved on a balance of probabilities that the 2<sup>nd</sup> respondent was run recklessly and with gross negligence.

### **DID 1<sup>ST</sup> RESPONDENT KNEW OR PARTICIPATE IN THE RUNNING OF THE BUSINESS IN SUCH MANNER?**

The 1<sup>st</sup> respondent admits knowledge and participation in the running of the 2<sup>nd</sup> respondent. It is neither here nor there for the respondent to attempt to hide behind collectivism. He was and is the man on the driving seat. He even authored the letter of 23 July 2023 suggesting how the debt was to be paid. The letter, although clothed with the "without prejudice" phrase, cannot enjoy the purported privilege as its use clearly shows that it is misguided.

### **EXECUTABILITY OF IMMOVABLES**

The applicant seeks as part of the relief, an order declaring stand number 1369 Mateta, Gokwe South specially executable. The reason behind this is because there is a tracing report which has identified the property as that of the 1<sup>st</sup> respondent. Even if this information were correct, there is no legal basis upon which such an order can be made in the absence of an agreement between the parties to that effect.

### **CONCLUSION**

The applicant proved its case on a balance of probabilities that the affairs of the 2<sup>nd</sup> respondent were being conducted recklessly or with gross negligence and that the 1<sup>st</sup> respondent, in his capacity as managing director, being the person the applicant seek to impute liability on, was knowingly and part of the carrying on of the business in such manner.

#### COSTS

The applicant asked for costs on a higher scale and I think justifiably so because of the intransigency demonstrated by the 1st Respondent in this matter in circumstances in which it has been established that he ran the business of the 2nd Respondent in a reckless or negligent manner.

#### DISPOSITION

##### IT IS ORDERED THAT

1. The 1st Respondent be and is hereby declared personally liable without limitation for payment of the debt owed by the 2nd Respondent to the Applicant.
2. The 1st Respondent shall pay the Applicant the sum of US\$106 207-51 [One Hundred and Six Thousand Two Hundred and Seven United States Dollars Fifty-One Cents] being the judgement debt owed by the 2nd Respondent together with interest on thereon at the prescribed rate calculated from the date of default to the date of full and final payment.
3. The 1<sup>st</sup> Respondent be and is hereby ordered to pay the costs of this application on a legal practitioner and client scale.

*Scanlen & Holderness, Applicant's Legal Practitioners*  
*Mboko TG legal practitioners, 1st Respondent's Legal Practitioners.*