DOCKING STATION SAFARIS
versus
YUUS AHMED

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 16 & 21 October 2015

Ruling on preliminary point - s 318 Companies Act

D Ochieng, for the plaintiff
S Ushewokunze, for the defendant

MUREMBA J: The plaintiff issued summons against the defendant who is a director of Foldaway investments (Pvt) Ltd for him to be declared personally liable for all the debts of Foldaway Investments (Pvt) Ltd on the grounds that as the director he conducted the business of Foldaway investments (Pvt) Ltd fraudulently, recklessly and negligently. In his plea, the defendant raised a point *in limine* to the effect that the plaintiff adopted the wrong procedure by proceeding by way of action when s 318 of the Companies Act [*Chapter* 24:03] makes it clear that such proceedings should be instituted by way of an application. At the pre-trial conference the parties agreed that this issue would be dealt with at the commencement of trial. At trial the parties argued the point *in limine*. The provision reads,

> **"Responsibility of directors and other persons for fraudulent conduct of business**
>
> (1) If at any time 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 liquidator or judicial manager or any creditor of or contributory to 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." (my emphasis)

In opposing the point *in limine* the plaintiff correctly submitted that s 318 does not stipulate the procedure for instituting proceedings against company directors. To begin with the Companies Act does not define the phrase "on the application" or the word "application". As such I do not see the basis of the defendant's argument that the provision prescribes the

procedure which ought to be adopted in instituting proceedings.

I hold the view that the phrase "on the application" in s 318 does not prescribe the procedure to be used but it simply means "on the request". In other words the phrase "on the application" can simply be substituted by the phrase "on the request".

What strengthens my conclusion is the fact that for a director of a company to be held personally liable for the debts of the company it ought to be proved that he carried on the business of the company recklessly or with gross negligence or with intent to defraud or for fraudulent purpose. Generally it is difficult to prove such conduct by way of affidavit evidence because there is bound to be material dispute of facts which needs the leading of *viva voce* evidence. As it is, in the present case the defendant vehemently denies having conducted business negligently or recklessly and with intent to defraud the plaintiff. I am inclined to believe that there is bound to be a material dispute of facts. If the plaintiff anticipated a material dispute of facts there was nothing wrong in it proceeding by way of action.

I believe that if a person decides to sue in terms of s 318 of the Companies Act, they are at liberty to proceed either by way of application or by way of action. The choice is really theirs depending on how they perceive the proceedings and the type of evidence that they will be having at hand.

For the foregoing reasons the preliminary point is dismissed.

Kevin John Arnott, plaintiff's legal practitioners
Ushewokunze Law Chambers, defendant's legal practitioners