126/96

Case No 365/95
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IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between :

FUNDSTRUST (PTY) LTD (IN LIQUIDATION) Appellant

v

SIMON FREDERICK VAN DEVENTER Respondent

CORAM : HEFER, EKSTEEN, NIENABER, HARMS et SCHUTZ JJA

DATE HEARD : 13 SEPTEMBER 1996

DATE DELIVERED : 8 NOVEMBER 1996

J U D G M E N T

HEFER JA :

The main issue in this appeal is the extent of the directors' liability for the debts of a company under sec 53(b) of the Companies Act 61 of 1973 ("the 1973 Companies Act").

The company in question is George Huysamer & Partners Incorporated ("the company"). The dispute arose from its dealings with Fundstrust (Pty) Ltd ("Fundstrust") during the latter half of 1991. Shortly before the latter's winding-up by order of court on account of its inability to pay its debts Fundstrust paid an aggregate amount of some R80,5m to the company. The liquidators were of the view that the payments were impeachable as voidable or undue preferences and instituted two actions in the Cape of Good Hope Provincial Division against the company for the recovery of the amounts paid. Thereafter, while those actions were pending, they issued summons in the same court against the present respondent and twelve co-defendants who were all alleged to have been directors of the company at all material times. The relief claimed in this action was an

order (1) declaring that the defendants were liable, jointly and severally with each other and with the company, for any amounts which the latter might be ordered to pay in the other actions, and (2) directing them to pay the amounts in question in the event of the alleged preferences being set aside in the other proceedings. The respondent excepted to the particulars of claim on the grounds that they lacked averments necessary to sustain a cause of action. The Court *a quo* (Tebutt and Van Deventer JJ) upheld the exception in part, set aside the particulars of claim and granted Fundstrust leave to appeal to this Court. This is the appeal which is presently before us.

In order to clear the way for a consideration of the main issue a preliminary point has to be disposed of. I will do so briefly.

Par 26 of the particulars of claim reads as follows:

> "26.1 In terms of Section 13(1) of the Stock Exchanges Control Act, No 1 of 1985, the Memorandum of Association of the company provides that its directors and former directors shall be liable, jointly and severally, together with the company for all debts

and liabilities of the company as are or were contracted during the period of office of such directors.

26.2 In the premises, the Defendants herein are jointly and severally liable, together with the company, for payment of the aforesaid amounts to Fundstrust."

The exception alleges that the particulars of claim did not disclose a cause of action because no facts were pleaded in support of any right or entitlement Fundstrust may derive from the memorandum. It would appear as if the respondent laboured under the misapprehension that par 26 was an attempt to found a cause of action solely on the company's memorandum of association. What he does not seem to have realised, because the particulars of claim did not tell him so, was that the allegations in par 26.1, in particular the allegation that the company's memorandum of association provided for the liability of directors, were aimed at sec 53(b) of the 1973 Companies Act which provides that

"[the] memorandum of a company may, in addition to the requirements of section 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."

It is apparent that the particulars of claim were lacking, not in additional allegations of fact, but in a specific reference to sec 53(b). In this regard the Court a quo (per Tebutt J) said:

> "It is not necessary in a pleading, even where the pleader relies on a particular statute or section of a statute, for him to refer in terms to it provided that he formulates his case clearly (see KETTERINGHAM v CITY OF CAPE TOWN 1934 AD 80 at 90) or, put differently, it is sufficient if the facts are pleaded from which the conclusion can be drawn that the provisions of the statute apply (see PRICE v PRICE 1946 CPD 59; WASMUTH v JACOBS 1987 (3) SA 629 (SWA) at 634I). In my view the plaintiff has pleaded all the factual allegations so as to justify reliance on Section 53(b)."

Mr Burger who represented the respondent in this Court challenged the Court *a quo*'s reasoning in his written heads of argument but informed us at the hearing of the appeal that he did not wish to argue the point. In view of his

reluctance to press his written contention, it will suffice to say that I agree with the Court *a quo*'s conclusion that the facts alleged in the particulars of claim, if established, will bring the section into operation.

I turn to consider the main attack upon the validity of Fundstrust's case. The relevant ground of exception is to the effect that

> "[the] obligation to repay the amounts paid to the company will only arise, if at all, on the exercise of the statutory discretion vested in the Court in terms of the provisions of sections 29 and/or 30 of the [Insolvency] Act, and, as such, the obligation is not one *'contracted during the period of office'* of the thirteenth defendant."

The pith of respondent's contention (which the Court *a quo* upheld) is that the directors' co-liability in terms of sec 53(b) is limited to a company's *contractual* debts and liabilities and does not include its statutory liability in respect of voidable or undue preferences. Mr Seligson who represented Fundstrust conceded that the liability in respect of voidable or undue preferences is indeed not of a contractual nature. The one remaining question is accordingly

whether the liability is limited to the extent for which respondent contends. The answer depends on the construction of the section.

On this issue argument in this Court centred largely on the word "contracted" in the phrase

> "*for such debts and liabilities of the company as are or were* CONTRACTED during their periods of office".

"Contracted" (or its present tense "contract") is not defined in the 1973 Companies Act. Viewed merely in the context of the underlined phrase the word does not seem to suggest that it is descriptive of the type of debt or liability for which the directors are liable. So regarded the intention seems to be that each director is liable for all debts and liabilities incurred during his or her period of office. This is the construction contended for by Fundstrust. But, when the matter is viewed from a slightly different angle by looking also at the words preceding the underlined phrase, another possibility comes to light. By focusing on the italicized words one comes to realise that "contracted" may well

have been used to indicate the type of debt for which the directors are liable. This is the construction for which the respondent contends.

In order to persuade us that "contracted" falls to be interpreted according to the needs of their respective cases counsel on both sides referred us to several well-known dictionaries. Before I proceed to deal in greater detail with the submissions I wish to say this. Recourse to authoritative dictionaries is of course a permissible and often helpful method available to the courts to ascertain the ordinary meaning of words (*Association of Amusement and Novelty Machine Operators and Another v Minister of Justice and Another* 1980 (2) SA 636 (A) at 660F-G). But judicial interpretation cannot be undertaken, as Schreiner JA observed in *Jaga v Dönges NO and Another* 1950 (4) SA 653 (A) at 664H, by "excessive peering at the language to be interpreted without sufficient attention to the contextual scene". The task of the interpreter is, after all, to ascertain the meaning of a word or expression in the particular context of the statute in which

it appears (*Loryan (Pty) Ltd v Solarsh Tea and Coffee (Pty) Ltd* 1984 (3) SA 834 (W) at 846G *ad fin*). As a rule every word or expression must be given its ordinary meaning and in this regard lexical research is useful and at times indispensable. Occasionally, however, it is not. The present appears to me to be such a case.

As one would expect the verb "contract" does not, according to the dictionaries, admit of a single meaning. Many of its connotations may be ignored since the only purpose of the present enquiry is to determine whether, in ordinary parlance, "contracted" debts and liabilities include anything other than debts and liabilities consensually incurred. The remaining ones are of little assistance because the context in which the word appears is of such a nature that one can hardly expect to find guidance in any dictionary.

Realising this difficulty Mr Seligson selected what appears to be the widest possible dictionary meaning of "contract" *viz* to "acquire" or "become

affected by". This, he submitted, would include the "acquisition" of, or being "affected by", any kind of debt or liability. Linguistically he may be correct; but it would be most unusual to say in ordinary parlance that a debt or liability is "acquired" or that the person concerned is "affected" thereby. To say that a tax or delictual liability is "contracted" would be equally unnatural: in ordinary parlance liability of such a kind is usually said to be "incurred" (cf *R v Landsman & Another* 1939 TPD 336 at 338-9). Bearing in mind further that "incur" is commonly used in legislation in relation to contractual debts and other liabilities alike, it is difficult to accept that, had the draughtsman been looking for a verb to suit contractual debts as well as other liabilities, he would have discarded such a well-known and obviously apposite term in favour of an inapposite one not ordinarily used.

The Afrikaans version of sec 53(b) presents the same problem. It refers to "die skulde en laste van die maatskappy wat gedurende hul ampstermyne

aangegaan word of is". Like its English counterpart the Afrikaans "aangegaan" (the past tense of the verb "aangaan") has several connotations, some of which may again be ignored in view of the narrow confines of the enquiry. Significantly the Afrikaans word does not appear in conjunction with "skuld" other than a contractual debt or liability in any of the recognised dictionaries and other literary works. This comes as no surprise because, I venture to say, any Afrikaans linguist would find the word entirely inapposite in the context, for instance, of delictual liability or the liability to pay a tax.

However, I am not convinced, merely upon an examination of the language, that Parliament intended to render the directors liable for a company's contractual debts only. In the absence of any other indication in the text we have a single word to go on; and as I have indicated it is a word which lends itself to different interpretations depending on the part of the provision which is brought into focus. On the construction for which Fundstrust contends,

"contracted" is not apposite; but inapposite language in legislation is not uncommon. On respondent's construction, on the other hand, we must assume that the draughtsman preferred to use a verb, instead of a suitable adjective, to qualify the two nouns "debts" and "liabilities". Why would he have done so? What grounds do we really have for suspecting that he intended the verb to serve as a qualification at all? Questions like these cannot be answered by merely peering at the words. The search for the legislature's intention must be conducted further afield by exploring the rest of the 1973 Companies Act, its background and purpose, and particularly that of the provision under consideration (*Jaga*'s case *supra* at 662H; *University of Cape Town v Cape Bar Council and Another* 1986 (4) SA 903 (A) at 914A-E). I proceed to do so.

A brief description of the development of South African company law appears in Cilliers, Benade, Henning, Du Plessis and Delport's *Corporate Law* 2 ed at p 18 par 2.12 to p 20 par 2.16 and p 16 par 2.06. For present purposes

the writers' survey of the period before 1926 will suffice, but it is necessary to deal more fully with the Companies Act 46 of 1926 as amended ("the 1926 Act"). I say this because the 1926 Act was the immediate precursor of the 1973 Companies Act and the relevant provisions of the latter were either copied from, or closely resemble the corresponding provisions of the former. More importantly, however, a provision along the lines of sec 53(b) of the 1973 Act found its way into our company law during 1968 by way of an amendment of the 1926 Act. Its *raison d'etre* is revealed by the events preceding the amendment; and discovering its purport may best be achieved by considering what the law was immediately before the amendment. (*Olley v Maasdorp and Another* 1948 (4) SA 657 (A) at 666.)

In its original form the 1926 Act contained no provision dealing with the liability of the directors for a company's debts. It did, however, contain provisions relating to the liability of members generally. Some of these

appeared in sec 107, the relevant parts of which read as follows:

> "**107. Liability as contributories of Present and Past members.** - In the event of a company being wound up, every present and past member shall, subject to the provisions of this section, be liable to contribute to the assets of the company to an amount sufficient for payment of its debts and liabilities and the costs, charges and expenses of the winding-up, and for the adjustment of the rights of the contributories among themselves, with the qualifications following (that is to say) :-
>
> (a) A past member shall not be liable to contribute if he has ceased to be a member for a period of one year or upwards before the commencement of the winding-up.
>
> (b) A past member shall not be liable to contribute unless at the commencement of the winding-up, there is unsatisfied debt or liability of the company *contracted* before he ceased to be a member.
>
> (c) ...
>
> (d) A past member shall not be liable to contribute in respect of any debt or liability of the company other than a debt or liability *contracted* before he ceased to be a member and unsatisfied at the commencement of the winding-up, or in respect of the costs, charges and expenses of the winding-up, except in so far as these have been occasioned by the necessity of recovering a contribution from him under this section."

The Afrikaans version of pars (b) and (d) is the following:

"(b) 'n Gewese lid is nie bydraepligtig tensy daar, by die begin van die likwidasie, 'n onvoldane skuld of las van die maatskappy bestaan wat *aangegaan* is voordat hy opgehou het om lid te wees.

(d) 'n Gewese lid is nie bydraepligtig ten opsigte van enige skuld of las van die maatskappy ander dan dié wat *aangegaan* is voordat hy opgehou het om lid te wees en wat onvoldaan is by die begin van die likwidasie ..."

It is important to note that sec 107 imposed on members the liability merely to contribute to a company's assets in the event of a winding-up. Before winding-up creditors had no right of action against any member; after winding-up they still had no right of action but benefited indirectly in that members could, as contributories, be ordered to pay to the company their individual shares of the amount required to satisfy its debts and liabilities (Sec 149(1).) (One of the requirements to contribute was that there should be an amount unpaid on the shares in question (sec 107 (g)). Prior to 1973 there was no general requirement that shares be fully paid up.)

Of further relevance is, firstly, sec 6(2)(a)(v). It required that it be stated

in the memorandum of association of a company limited by guarantee that each member undertakes to contribute to the assets of the company in the event of it being wound up while he is a member, or within a year after he ceases to be one, for payment "of the debts and liabilities of the company *contracted* ("aangegaan") before he ceases to be a member" and for the costs and charges mentioned in the introductory part of sec 107. Secondly, there is sec 101 which dealt with the event of a company carrying on business for more than six months while its members had been reduced below the required number. It rendered all persons who were members during the relevant time and were cognizant that the company was doing so, severally liable for payment of "the whole of the debts of the company *contracted* during that time."

The liability of directors was specifically dealt with for the first time in 1939 when the 1926 Act was amended by the insertion of sec 185bis(1). The new section provided for the personal liability of directors in cases where it

appeared in the course of a winding-up that any business of a company had been carried on with intent to defraud creditors or for any fraudulent purposes. In such an event

> "the Court, on the application of the Master, or the liquidator or any creditor or contributory to the company, may, if it thinks proper so to do, declare that any of the directors, whether past or present, of the company who were knowingly parties to the carrying on of the business in 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."

The 1926 Act was again amended during 1968. How this came about is of vital importance. The account of the events which I am about to give derives from the reports of two judicial commissions of enquiry appointed during the sixties. Counsel on both sides referred us to the reports and, on the authority of the decision in *Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* 1986 (2) SA 555 (A) at 562D-563A, I am satisfied that it is permissible to have regard to their contents.

During 1962 the Stock Exchange Inquiry Commission (usually referred to as the Broome Commission) was appointed to enquire and report *inter alia* in regard to desirable amendments to the Stock Exchanges Control Act 7 of 1947 ("the 1947 Act"). At that stage no one was allowed to carry on business as a stockbroker unless he was a member of a licensed stock exchange. (It is unnecessary to mention the exceptions to this general prohibition.) Corporate membership of such an exchange was not permitted but the Commission accepted a suggestion of the Accountants' Board

> "that, for the adequate protection of clients and creditors of brokers, consideration should be given to the desirability of requiring stockbrokers to incorporate their business as private companies, which would provide a means whereby a stockbroker's business creditors would have the security of both the company's assets and of his personal guarantee".

It accordingly recommended that the 1947 Act be amended to provide *inter alia* for corporate membership of an exchange by way of *unlimited* private companies.

In the meantime the Commission of Enquiry into the Companies Act (usually referred to as the Van Wyk de Vries Commission) which had been appointed to consider possible amendments in the law relating to companies and other associations had been conducting its own investigations, which led it to believe that unlimited companies should no longer be allowed. The Commission became aware of the recommendation of the Broome Commission before it was in a position to submit a final report and (as appears from par 49.14 of the report eventually submitted during 1970) "gave an indication" of its intention to recommend the abolition of unlimited companies. The relevant paragraph in the report continues:

> "It appeared that the unlimited company form would in any event not be suitable because the shareholders (the former partners of a firm) would not be concurrently liable for the debts and liabilities of the company; that liability would arise only in winding up. This aspect was considered not to be in the public interest.
>
> It was then decided to recommend an amendment to section 6 of the [1926] Act in order to provide for a private company with the concurrent joint and several liability of the directors for the

debts and liabilities of the company."

This recommendation was put into effect by the passing of the Companies Amendment Act 62 of 1968 ("the Amendment Act"). Apart from other amendments sec 6A was inserted in the following terms in the 1926 Act:

> "**6A** The directors and former directors of a private company limited by shares 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, if the memorandum of association of the company contains a provision to that effect."

(The relevant words in the Afrikaans text were "dié skulde en laste van die maatskappy wat aangegaan word of is gedurende hul ampstye".)

Thereafter the 1947 Act was amended by Act 86 of 1971 by the insertion of sec 8A(1) in the following terms:

> "**8A.**(1) As from the commencement of the Stock Exchanges Control Amendment Act, 1971, a corporate body shall not be capable of becoming a member, and, as from the 1st July, 1978, no such body shall remain a member, of any licensed stock exchange, unless it is a corporate body which is a private company having a

> share capital, incorporated and registered under the Companies Act, 1926 (Act No. 46 of 1926), and whose memorandum of association states that its directors and former 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."

(The section was subsequently rephrased without any change to its substance and in its new form eventually became sec 13(1) of Act 1 of 1985 referred to in par 26.1 of the particulars of claim.)

Against this historical background I turn to deal with the submissions made on Fundstrust's behalf in support of its contention that sec 53(b) of the 1973 Companies Act must be interpreted in such a way that the directors of a company providing for joint and several liability of the directors in its memorandum of association are liable for all, and not merely the contractual, debts and liabilities of a company. The key to the interpretation of sec 53(b) is obviously sec 6A of the 1926 Act and I will accordingly deal with the argument in the context of the latter.

The first submission is that sec 6A must be interpreted on the supposition that Parliament intended to impose upon directors a liability equal to the common law liability of partners. Taking his cue from the reference to the former partners of a firm in the cited passage from the report of the Van Wyk de Vries Commission, Mr Seligson argued that the intention was to render the directors liable on the basis that, as partners, they would have been personally liable for all the debts. I do not agree. The suggestion that the intention was to retain the liability of partners as a *quid pro quo*, as it were, for the benefits which stockbrokers would reap from corporate membership finds no support in the legislation. It appears from the report that the idea of corporate membership by way of unlimited companies was rejected mainly because it would not allow for *concurrent* liability on the part of the directors (in view, it would seem, of the provisions of sec 107 of the 1926 Act). It was for that kind of liability that sec 6A provided and, bearing in mind the well-known principles of the common

law and our legal practice (described *inter alia* in Wille & Millin's *Mercantile Law of South Africa* 18 ed 562 and cases cited there), this could not be achieved by imposing on the directors the liability of partners. 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.

Another submission is that the words used in the South African legislation must be given the same meaning that they had in the context of the corresponding English legislation. It is based on the similarity between the 1926 Act and the English Companies (Consolidation) Act, 1908 (8 Edw 7 c 69 - "the 1908 English Act"). That the two Acts, and particularly the provisions relating to the liability of members for a company's debts and liabilities, are strikingly similar, is apparent; the reason is obvious because the 1926 Act was, as we

know, based on Transvaal Act 31 of 1909 ("the Transvaal Act"), which in turn was based on the 1908 English Act.

The short answer is that, although "contracted" was used in the context of debts and liabilities consistently in English company legislation at least since 1862 (when the Companies Act, 1862 (25 & 26 Vict c 89) was passed), it never acquired a meaning in England which the South African legislature could have had in mind when using the same word in the 1926 Act. The principle that Parliament is presumed to be acquainted with the existing law and with the interpretation of earlier legislation by the courts can only be applied if the words in question had acquired a settled and well recognised judicial interpretation before the relevant legislation was passed (*Ex Parte Minister of Justice: In Re Rex v Bolon* 1941 AD 345 at 360). In dealing with a similar argument in *Smith v Clark* 1935 AD 224 at 227, Stratford JA said:

> "This section of the Natal Act was, admittedly, copied from an earlier Cape Act. If there had been at that time a judicial

> interpretation of the similar Cape section it would, perhaps, be reasonable to suppose that the section was adopted by Natal in the judicially interpreted sense. (See *Krause v Commissioner for Inland Revenue* 1929 AD at p 297.) But there was no such interpretation ..."

Nor is there in the present case. We were not referred to a single English decision (nor, for that matter, to any South African one relating to the Transvaal Act) in which the meaning of "contracted" was discussed. The South African legislature simply adopted English provisions to which the English courts had not attached any particular meaning.

A further submission relates to the reference in other sections of the 1926 Act to a company's "contracted" debts and liabilities. (As mentioned earlier such a reference occurred in secs 6(2)(a)(v) and 107(b) and (d), and in sec 101 mention is made of "the whole of the debts of the company contracted during that time".) The argument is to the effect that, correctly construed, all these sections imposed liability in respect of every kind of debt; and that sec 6A has

to be construed accordingly. Again I do not agree. One cannot blandly accept as a first premise that the word was intended to convey the same meaning wheresoever it was used in the other provisions because different considerations may affect the interpretation of each or any particular one of them. Sec 6(2)(a)(v) for example differed from the others in that it dealt with an *assumed* liability which may require a less strict interpretation than secs 101 and 107 which *imposed* liability; and, unlike sec 107 which affected all members whose shares had not been paid for in full, sec 101 only affected members who were aware that their company had been carrying on business while its members had been reduced below the required number. Be that as it may, I am prepared to assume that all the other sections were sufficiently wide to render members liable for every kind of debt or liability incurred by the company.

Non constat that sec 6A has to be interpreted in similar fashion. The other sections simply followed the wording of the 1908 English Act which, as

I have shown, had not acquired a settled meaning at the passing of the 1926 Act. There is no reason to believe that any real thought or effort went into their formulation. Sec 6A was inserted more than forty years later for a very specific purpose and for very special reasons. It was aimed, moreover, at a special type of company which would neither be of the ordinary unlimited, nor of the ordinary limited, type; in a sense it would be something in between. It is instructive to see how the Van Wyk de Vries Commission viewed such a company in par 49.15 of its report:

> "The amendments to sections 6 and 58 were enacted by Act 62 of 1968 and the Stock Exchange Control Bill contains corresponding provisions which will enable firms of stockbrokers to incorporate by using this special form of private company.
>
> While evolving this special form of private company for purposes of stockbroking firms the Commission always had in mind the possibility that it might conveniently be used by organised professions for similar purposes. It seems to provide a type of company which would lend itself to the requirements of professions permitting the incorporation of its members."

The use of the stock expression "debts and liabilities of the company contracted

..." in the new sec 6A does not really advance the enquiry. By that time the expression had still not acquired a settled meaning and the Amendment Act was passed at a stage when the Van Wyk de Vries Commission had not completed its investigation. It was plainly intended as a temporary measure to operate until a new Companies Act could be prepared. In all probability the draughtsman retained the expression simply because it already appeared elsewhere in the 1926 Act without properly considering its possible implications. Had the intention really been to include debts and liabilities of every kind the much clearer wording of sec 185bis(1) could have been followed and it is legitimate to wonder why this was not done.

Mr Seligson's last submission is that respondent's construction would lead to anomalous results which could not have been intended. On that construction, so the argument goes, the directors would be liable for a contractual debt owed to an incorporated stockbroker's client, but not for money stolen from him; and

they would be liable in respect of the company's office rental and telephone account, but not for its tax obligations.

In considering this submission we must bear in mind that faithful avoidance of anomalies is not the lawgiver's forte. This is one of the reasons why it is often said that a departure from the plain words of a statute on account of anomalous results is only justified when the court is satisfied that such results were not intended. (*Manjra v Desai and Another* 1968 (2) SA 249 (N) at 254A-C; *Constantia Insurance Co Ltd v Hearne* 1986 (3) SA 60 (A) at 69F-G; cf *Suid-Afrikaanse Spoorweë en Hawens v Van den Berg en 'n Ander* 1983 (1) SA 964 (A) at 976H-977D.) Similarly, where a statute is capable of more than one interpretation the fact that a particular construction would lead to an anomaly is not necessarily a conclusive indication that that construction was not intended. In *Hatch v Koopoomal* 1936 AD 190 at 209, Stratford JA said:

> "[T]he degree of absurdity or repugnance is of importance, as it bears upon the intention of the enactment under discussion. If,

> examining results, you find absurdity or repugnance of a kind, which, from a study of the enactment as a whole, you conclude the Legislature could never have intended, then you are entitled so to interpret the enactment as to remove the absurdity or repugnance..."

A construction leading to an anomalous result should accordingly only be rejected if the conclusion is justified that the result could not have been intended. (Cf *South African Transport Services v Olgar and Another* 1986 (2) SA 684 (A) at 698I-699B.) Of course, if anomalies arise in more or less equal degree on either construction, they may be discarded as factors in the interpretation. *(Principal Immigration Officer v Hawabu and Another* 1936 AD 26 at 35.)

I agree that respondent's construction will lead to anomalous results; but not to the degree that Mr Seligson suggested. As far as a stockbroker's clients are concerned (and, for that matter, also the clients of the other professional companies envisaged in the Van Wyk de Vries Commission's report), I am unable to perceive any anomaly. Since there is a contractual relationship

between a stockbroker and his client, requiring honesty and reasonable care, any loss which the latter might suffer as a result of his broker's fraudulent or negligent conduct, would be recoverable by way of a contractual action and the directors would be liable under sec 6A (or its successors). There may be cases, difficult to envisage, where this may not be possible, but such cases must be so rare that they may be left out of consideration (cf *South African Mutual Fire & General Insurance Co Ltd v Bali NO* 1970 (2) SA 696 (A) at 710B-C).

Among other creditors there are, firstly, those with delictual claims against the company and, secondly, those with enrichment claims and, thirdly, those to whom the company is liable for tax and other statutory charges. Those of the first type were not left entirely without remedy against the directors: sec 6A did not detract from the personal liability at common law of any particular director arising from his own involvement in a harmful act or omission; nor did it detract from a director's liability under sec 185bis(1). It must be accepted,

however, that their position would, on respondent's construction, not be as favourable as that of contractual creditors. We must also accept that creditors of the second and third type would, on that construction, have no remedy against the directors except under sec 185bis(1) in suitable cases.

I am by no means convinced that this result was not intended. There is no indication, either in the reports of the Commissions of Enquiry or in the 1926 Act, that it was intended to relate the directors' liability to unusual events or to anything other than its ordinary financial or commercial commitments. Taking into account the type of company we are dealing with, I do not think that the liability arising from the commission of a delict would normally be regarded as one of its ordinary business debts. This may also apply to statutory liabilities which do not form part of the company's regular expenses.

However, on Fundstrust's own construction there is an anomaly which I am convinced could not have been intended and in any event outweighs, or at

least counterbalances, the anomaly pertaining to respondent's interpretation. Sec 6A related the liability of every past or present director to the period of his office. This is perfectly understandable: Parliament obviously regarded it as just and equitable that a director should not be liable in respect of a debt or liability incurred while he was not on the board and in which he could not possibly have been involved, or which relates to something he could not have prevented. The present case may be used as an example to demonstrate that, in the case of statutory liabilities, the position is different. Counsel were agreed that the company's liability in respect of the alleged preferences could at the earliest have arisen on the date of the winding-up order. At that stage the directors might well have changed. On Fundstrust's construction directors who were on the board when the company received the payments but had resigned before the date of the order, would not be liable; but those who had not been on the board at the time of the payments but had been appointed since, would

indeed be liable despite the fact that they could not possibly have been involved in the receipt of the payments or in the transactions preceding them. It is difficult to accept that Parliament intended such a result.

Having rejected all the contentions advanced on Fundstrust's behalf all that remains is to apply what we have learnt so far. The conclusion can be stated in a single sentence, namely: In view of the wording of sec 6A and the anomaly to which I have referred, Fundstrust's construction cannot be accepted.

Another approach leads to the same conclusion. One of the cardinal principles of company law in general, and the 1926 Act in particular, is that a company is a distinct legal entity capable of owning property and incurring debts for which its members and directors are as a rule not personally liable. As Innes CJ remarked in *Dadoo Ltd and Others v Krugersdorp Municipal Council* 1920 AD 530 at 550,

> "[t]his conception of the existence of a company as a separate entity distinct from its shareholders is no merely artificial and

technical thing. It is a matter of substance..."

It is well to remind oneself of Lord MacNaghten's well-known observation in *Aron Salomon v A Salomon & Co Limited* [1897] AC 22 (HL) at 51 that

> "the company is not in law the agent of the subscribers or a trustee for them. Nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act."

In my view the application of this principle entails that any doubt that there may be as to the extent to which sec 6A of the 1926 Act rendered directors personally liable for company debts and liabilities ought to be resolved by construing the provision strictly, and by giving preference to its least onerous interpretation. This is in any event how onerous statutory provisions are generally construed. (*Park Gebouebeleggings en Wynkelders Bpk v Stadsraad van Vanderbijlpark* 1965 (1) SA 849 (T) at 851C-F; *Klerksdorpse Stadsraad v Renswyk Slaghuis (Edms) Bpk* 1988 (3) SA 850 (A) at 876D; Devenish: *Interpretation of Statutes* 171; Du Plessis: *The Interpretation of Statutes* 86,

89; Steyn: *Die Uitleg van Wette* 5 ed 103.) Sec 6A impinged on the principle of corporate existence and imposed upon directors a liability which they did not have before. It is precisely the type of provision that needs to be interpreted strictly. Its least onerous construction is the one contended for by the respondent.

The inevitable result of this conclusion is that sec 53(b) of the 1973 Companies Act, the substance of which is precisely that of sec 6A of the 1926 Act, must be similarly construed. There is nothing in the 1973 Act which justifies a different conclusion. All that need be said in this regard is

(1) that the 1973 Act contains no provision corresponding to sec 107 of the 1926 Act (although, in terms of sec 338(2) the provisions of the 1926 Act shall continue to apply to the winding-up of a company having shares which are not fully paid up);

(2) that the references to a company's "contracted" debts and liabilities

elsewhere in the 1973 Companies Act (in secs 52(3)(b), 66 and 395(2)(a)) are of no assistance for the same reasons that secs 6(2)(a)(v) and 101 were of no assistance in the interpretation of sec 6A of the 1926 Act.

I am accordingly of the view that the exception was rightly upheld.

The appeal is dismissed with costs including the costs of two counsel.

J J F HEFER JA

AGREED : EKSTEEN JA
NIENABER JA
HARMS JA
SCHUTZ JA