

The Supreme Court reminds what the requirements to hold directors liable for the company's debts are

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The Spanish Supreme Court recently ruled on an action seeking the liability of the sole director of a company brought by a supplier of the latter¹.

In addition to the action brought against the debtor company, the supplier pursued the so-called *individual liability action* against its sole director and a *de facto* director. According to the judgment, the sole director was a person charged with merely clerical functions, while the *de facto* director was one of the shareholders that actually controlled the company.

The Supreme Court overruled the first instance court and the appeals court decisions (that had declared the joint and several liability of both the *de facto* and the formal directors) and dismissed the claim of the supplier as far as the formal director was concerned. The *de facto* director did not challenge the appeals court decision.

In the first instance, the Supreme Court clarified that *individual liability* of directors has a non-contractual (in tort) nature. Therefore, certain conditions have to be satisfied for a director to be held liable:

- i. an active or passive behaviour attributable to the director,
- ii. such behaviour must be unlawful or violate the company's bylaws or, at least, must be negligent,
- iii. there must be a causal link between said behaviour and the damage caused, and
- iv. the damage must have been suffered directly by the plaintiff (there is no need that the damage also affects the interest of debtor company).

The Court then pointed out that the *individual liability action* brought in the case at hand is not applicable only because the company has breached its obligations *vis-à-vis* one of its creditors. Under this type of action, a director is not liable for the company's debts solely because the company is under the obligation to be liquidated and the director has not adopted the measures provided for by the law for these cases, except when the plaintiff proves that it would have collected its claim had the company been timely wound up.

The Supreme Court also reminds that creditors whose claims have arisen *after* the occurrence of a compulsory liquidation event have an action against the debtor company's directors in case the latter have not timely fulfilled their specific duties. However, in the case at hand the plaintiff brought a different action, probably because its claim had arisen *before* the occurrence of the compulsory liquidation event.

In addition, it is possible that the Supreme Court wanted to render an equitable decision, dismissing the action brought against an administrative assistant, who might have been maliciously induced by the *de facto* director to accept her appointment as a formal director, precisely to interpose her between the company's creditors and the former.

¹ Judgment nº 253/2016, of 18 April 2016.