

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 7095/2008

In the matter of:-

<u>KURT ROBERT KNOOP N.O.</u>	1 st Applicant
<u>NICOLA CRONJE N.O.</u>	2 nd Applicant
<u>MATLATSI WILLIAM LEKHESA N.O.</u>	3 rd Applicant
<u>JOHANNES ZACHARIAS HUMAN MULLER N.O.</u>	4 th Applicant

and

<u>BIRKENSTOCK PROPERTIES (PTY) LTD</u>	1 st Respondent
<u>JAN GERRIT VAN DEVENTER N.O.</u>	2 nd Respondent
<u>JACOB VAN DER WESTHUIZEN</u>	3 rd Respondent
<u>NEETHLING N.O.</u>	

<u>HEARD ON:</u>	23 APRIL 2009
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<u>JUDGMENT BY:</u>	NXUSANI, AJ
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<u>DELIVERED ON:</u>	4 JUNE 2009
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[1] The Applicants are the Trustees in the insolvent estate of the
Etrecia Birkenstock to whom I shall refer as the insolvent in
this judgment.

- [2] The insolvent estate was provisionally sequestrated on 16 November 2004 and finally sequestrated on 14 December 2004. The Applicants were appointed as Trustees of the insolvent state on 16 March 2005.
- [3] During the performance of their duties the Applicants reported to the second meeting of creditors on 19 August 2005 that the creditors would probably have to make a contribution.
- [4] The Applicants conducted an investigation into the insolvent's affairs and arrived at the conclusion that the insolvent was using a Trust created by execution of a Trust Deed on 22 April 1999 as well as the First Respondent as a front for her own benefit even though her estate had been sequestrated without assets for the benefit of creditors. The Applicants discovered that a substantial amount of money was due to be paid to the First Respondent and that the insolvent had made demands upon the First Respondent to be paid.

- [5] The Applicants accordingly launched these proceedings to obtain what is known as an anti-dissipation order.
- [6] On 27 November 2008 the parties consented to an interim order being granted preserving the proceeds from an investment released from Cherangani Trade and Invest 107 (Pty) Ltd. These monies were to be deposited in an interest bearing account held by the Applicants' attorneys. Provision was made for a sum of R517 000,00 to be utilised by the First Respondent *inter alia* to ensure that it would be in a position to meet the claims of *bona fide* creditors. Since then the application has been adjourned from time to time until it came before me as an opposed application.
- [7] The Respondents have raised a number of preliminary issues. One of these issues raised is that the Applicants have not made out a *prima facie* case in respect of the claim in the action which the Applicants intend to institute. I consequently requested the parties to stand over any argument on the other issues remaining in the dispute because if the Respondents were correct, it would dispose of the application.

- [8] The Deed of Trust was executed on 22 April 1999, a considerable period before the insolvency.
- [9] It must follow therefore that when the Trust was formed, the insolvent could lay, in law, no claim to the Trust property.
- [10] In order to lay claim to the funds the Applicants are constrained to make out a *prima facie* case that the Trust and the First Respondent have misused or abused the principle of corporate personality and that this court must lift the corporate veil so as to attribute liability to the person behind the corporate entity. The Applicants must also show that the property of the First Respondent and the Trust are in truth that of the insolvent.

See: CAPE PACIFIC LTD v LUBNER CONTROLLING INVESTMENTS (PTY) LTD AND OTHERS 1995 (4) SA 790 (A).

- [11] The corporate veil may be pierced where there is proof of fraud of dishonesty or other improper conduct in the establishment or the use of the company or the conduct of its affairs and in this regard it may be convenient to consider

whether the transactions complained of were part of a “device”, “stratagem”, “cloak” or a “sham”.

See: **THE SHIPPING CORPORATION OF INDIA LTD v EVDOMON CORPORATION AND ANOTHER** 1994
(1) SA 550 (A) at 556 C – F.

[12] A court will not lightly disregard a corporate entity’s separate legal personality and will endeavour to maintain the separate personality.

[13] This reluctance is said to exist because of the deeply seated notion of fair play in our law.

[14] When there is fraud, dishonesty or some other improper conduct, policy dictates that the court engages in a balancing exercise. The court considers the circumstances and facts of each case to determine whether in the appropriate case, it is proper to disregard the corporate personality and apportion liability where it belongs.

See: CAPE PACIFIC LTD v LUBNER CONTROLLING INVESTMENTS (PTY) LTD AND OTHERS, *supra*, at 803.

[15] Where the use or the establishment of a corporate entity is borne out of deceit, fraud or impropriety, the corporate veil may yet still be lifted.

[16] Where a corporate entity was properly established but has been misused in a particular instance to perpetrate fraud, or a dishonest or improper purpose, there is no reason in principle why its separate personality cannot be disregarded in relation to the transaction in question while giving full effect to it in other respects.

See: CAPE PACIFIC LTD v LUBNER CONTROLLING INVESTMENTS (PTY) LTD AND OTHERS, *supra*, at 804 D.

[17] In my opinion it matters not whether the corporate entity is a Trust or a company. Provided it can be established on a balance of probabilities, that the particular transactions

complained of were the tainted fruits of fraud or other improper conduct, a court would, in appropriate circumstances, disregard the separate legal personality in order to reveal the perpetrator as the “true villain of the piece”.

See: CAPE PACIFIC LTD v LUBNER CONTROLLING INVESTMENTS (PTY) LTD AND OTHERS, *supra*, at 804 I.

[18] When a court pierces the corporate veil in regard to a particular transaction, it does not thereby visit the other legitimate and proper corporate activities with illegality.

See: CAPE PACIFIC LTD v LUBNER CONTROLLING INVESTMENTS (PTY) LTD AND OTHERS, *supra*, at 804 J.

[19] In the present case the monies transmitted to the insolvent by the First Respondent and the Trust were effected *sine causa*. The fact that the insolvent received monies from these entities only meant that they have a claim for the return

of the asset because they are void of any legal validity. The Applicants can have no greater right than the Respondents because they are the true owners of the property. In my judgment the Trustee of an insolvent estate cannot lay claim to property which otherwise does not belong to an insolvent. The lifting of the corporate veil cannot make what is otherwise the property of the entity, property which belongs to the insolvent.

[20] The Applicants have, in seeking to bolster in the case for piercing the corporate veil, argued that the Trust was borne of an improper purpose in the sense that it was designed to place the insolvent's assets beyond reach of her erstwhile husband, Mr. Dolf Birkenstock.

[21] I am not convinced that the insolvent's husband was entitled in law or otherwise to claim a stake in the insolvent's business but even if he did have such a claim he evidently abandoned any rights that he may have had.

[22] The evidence is that the insolvent was herself married to an unrehabilitated insolvent, Mr. Dolf Birkenstock, who had no

assets to his name. The insolvent appeared to have commenced the transport business and ran these in her own name. The insolvent's husband who apparently endeavoured to rehabilitate himself employed means in an effort to appropriate the insolvent's assets for himself.

[23] In my view, it cannot be contended that the Trust was set up to sequester the insolvent's assets from her creditors. The insolvent's husband was not a *bona fide* creditor. But even if the Trust was set up to place the insolvent's assets beyond her husband's reach this fact cannot be used to augment the Applicant's case for a piercing of the corporate veil. I accept that "opening the curtains" or piercing the veil is rather a drastic remedy. For that reason alone it must be resorted to, rather sparingly, and, indeed as the very last resort in circumstances where justice will not otherwise be done between two litigants. It cannot, for example, be resorted to as an alternative remedy if another remedy on the same fact can successfully be employed in order to administer justice between the parties.

See: **AMLIN (SA) PTY LTD v VAN KOOIJ** 2008 (2) SA 558
(C) at 567 J – 568 B.

[24] Piercing takes at least two forms. Firstly, there are cases where the court disregards the company and treats the members as if they have been acting in partnership (or where the company has a single member, as if he had been acting on his own behalf), the consequences are that they are, for example, held to be the owners of the property otherwise owned by the company, or to be personally liable for its debts and other liabilities.

[25] Secondly, there are those cases where obligations incurred by the shareholders in their personal capacity are treated as if they were incurred by the company.

See: Blackman *et al* **Commentary on the Companies Act**,
Volume 1 2002, with loose-leave updates, Revision
Service 1 at 4-114 – 116.

[26] A court may be empowered to go behind a Trust form. This may exist where enjoyment and control are not functionally

separate in the Trust instrument. It is this separation that serves to secure diligence on the part of Trustees because it secures diligence since a lapse may be visited with action by the beneficiaries whose interests conduce to proper control. This separation also ensures independence and the careful scrutiny of transactions designed to bind the Trust.

- [27] A Trust has the virtue of flexibility and a lack of formality in creation and operation. It is therefore easy to use a Trust to manipulate a debtor's precarious financial situation.

See: LAND AND AGRICULTURAL BANK OF SOUTH AFRICA v PARKER AND OTHERS 2005 (2) SA 77 (SCA) at 87.

- [28] Where Family Trusts are concerned it usually occurs that functional separation between control and enjoyment is lacking. These Business Trusts are designed to secure the interests and protection of a group of family members either identified in the Trust by name or by descent or by degree of kingship to the founder.

See: LAND AND AGRICULTURAL BANK OF SOUTH AFRICA v PARKER AND OTHERS, *supra*, at 88.

[29] Where a Family Trust is set up to ensure either estate planning or to escape the constraints imposed by corporate law and assets are put into a Trust, a court may in appropriate cases look beyond the Trust form. A critical consideration here would be the time-line between the creation of the Trust and the complaint regarding the conduct.

[30] The reason for looking behind the Trust form is because usually everything has remained “as before”. Where the rupture of the control/enjoyment divide results in abuse, beneficiaries who control the Trust, will in their capacities as Trustees, have little or no independent interest in ensuring that transactions are validly concluded. If things go awry they would have every inducement as beneficiaries to deny the Trust’s liability. They are also unscrupulous in that they are easily able to rely on deficiencies in form or lack of authority because their conduct as Trustees is unlikely to be scrutinised by the beneficiaries. In such cases the Trustees

are the beneficiaries or those who through close family connection have an identity of interest with them.

See: LAND AND AGRICULTURAL BANK OF SOUTH AFRICA v PARKER AND OTHERS, *supra*, at 88.

[31] I have no doubt that the insolvent and Barnard treated assets of the First Respondent and the Trust in a manner which is suspicious and highly irregular. An irregular or improper use of a corporate entity does not *ipso facto* make their assets the property of a beneficiary.

[32] There was a breach of section 38 of the Companies Act permitting the First Respondent to make a loan to the Trust to enable it to acquire shares held by Business Partners in First Respondent.

[33] The fact that there may well have been a breach of section 38 of the Companies Act is in my view insufficient to vest the property of the First Respondent, in the insolvent. If this is so it can hardly vest the property in the hands of the Applicants.

[34] On assumption that the Applicants are correct that there have been several instances of improprietary and fraud perpetrated *inter alia* by the insolvent, such conduct can never in my judgment, vest the property belonging to these entities in the Applicants. For that reason the application must fail.

[35] The application is accordingly dismissed. Having regard to the conduct of the First Respondent and the Second Respondent, I consider that it is not appropriate to make any costs order. I consequently make no order as to costs.

J. NXUSANI, AJ

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