

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN

Not reportable

Case no: CA12/19

In the matter between:

JOHN STEWART WILSON

Appellant

and

SEAN PRINSLOO

Respondent

In re:

SEAN PRINSLOO

Applicant

and

EXPIDOR 163 CC t/a THE LEAGUE OF

GENTLEMENT

First Respondent

JOHN STEWART WILSON

Second Respondent

Heard: 23 September 2020

Delivered: 31 May 2021

Coram: Davis JA, Jappie JA and Kathree Setiloane AJA

JUDGMENT

DAVIS JA

Introduction

- [1] The essence of this appeal concerns the question of whether it was appropriate, on the facts before the court a quo, to lift the corporate veil.
- [2] The court a quo answered the question in the affirmative and accordingly ordered that the appellant was liable for the obligations arising from the employment relationship between the first respondent (Expidor 163 CC t/a The League of Gentlemen) and the respondent (applicant in the court a quo). The court a quo further ordered that the appellant was liable to comply with an arbitration award which had been issued in favour of the respondent on 22 February 2016 and which award had been made an order of court on 20 January 2017. With the leave of the court a quo the appellant has approached this court.

Factual Background

- [3] On 4 March 2014 the respondent was appointed as the marketing manager of the League of Gentlemen (LOG). The letter of appointment was signed by the operations manager for LOG, Mr Derrick Stewart. According to the affidavit deposed to by the respondent, no reference was made to Expidor 163 CC (Expidor) in this correspondence. According to the respondent, after Mr Stewart passed away on 6 July 2015, the appellant called him to a meeting on 9 July 2015 and advised that he will be closing LOG with immediate effect. At the same meeting, he offered the respondent an option to buy the business of LOG. When the respondent failed to secure the necessary loan and therefore was not able to acquire the business, he approached the appellant and requested a retrenchment package.

- [4] In order to assist in procuring a retrenchment package, the respondent sought advice from Mr Deon De Jager of Solidarity. Mr De Jager contacted the appellants' attorney and it was at this point that he was advised that LOG was the trading name of Expidor 163 CC and that the respondent was employed by Expidor.
- [5] As a result, Solidarity, acting on behalf of the respondent, cited Expidor as the employer in a dispute that was referred to the CCMA on 23 September 2015 and later on 19 October 2015.
- [6] At conciliation proceedings on 16 October 2015, the appellant advised that LOG was insolvent and that the respondent had been dismissed. As a result, the commissioner charged with an attempt at conciliation, advised the respondent that he would have to refer an unfair dismissal dispute to the CCMA. This was done by Solidarity on behalf of respondent on 19 October 2015. In its referral both Expidor and appellant were cited. A further conciliation meeting took place on 9 November 2015 which appellant attended.
- [7] When the arbitration proceedings began on 10 February 2016 the appellant did not attend. An arbitration award was issued in favour of respondent on 22 February 2016, ordering LOG to pay the respondent the amount of R 165 669.25 on or before 10 March 2016.
- [8] Subsequent events proved that the award was unenforceable, as Expidor had no assets. This situation was conveyed to respondent in September 2015. Subsequent thereto, the respondent approached the court *a quo* for relief to the effect that the appellant be joined as a party to the proceedings, that it be ordered that he (appellant) was the respondent's employer, that he be held jointly and severally liable for the obligations arising from the employment relationship between Expidor and respondent, and further that the appellant be held jointly and severally liable with Expidor for the obligations flowing from the award issued by the CCMA.

The judgment of the court *a quo*

- [9] The court *a quo* correctly noted that what the respondent sought was an order declaring that appellant was his true employer for the purposes of joint and several liabilities in respect of obligations arising from his employment relationship with Expidor. It is significant that the respondent did not rely upon s 65 of the Close Corporation Act 69 of 1984. Its importance to this appeal necessitates that it be carefully considered. The section provides:

‘Whenever a Court on application by an interested person, or in any proceedings in which a corporation is involved, finds that the incorporation of, or any act by or on behalf of, or any use of, that corporation constitutes a gross abuse of the juristic personality of the corporation as a separate entity, the Court may declare that the corporation is to be deemed not to be a juristic person in respect of such rights, obligations or liabilities of the corporation, or of such member or members thereof, or of such other person or persons, as are specified in the declaration, and the Court may give such further order or orders as it may deem fit in order to give effect to such declaration.’

- [10] Notwithstanding that the case of the respondent was not brought in terms of this section which expressly deals with the question of looking beyond the identity of the corporation, the court *a quo* lifted the corporate veil on the basis of a number of evidential findings; in particular, that:

1. The appellant did not dispute that on Stewart’s advice, a pre-employment meeting with the respondent had taken place to assess the latter’s suitability for the position of marketing manager. The appellant had attended this meeting;
2. The appellant had admitted discussing the operations of the LOG in that meeting with a view to adopting a turnaround strategy;
3. The appellant had met the respondent at the commencement of his employment;

4. The respondent's salary had been paid by the appellant in cash and he had stayed on the property owned by the appellant during the period of his employment, albeit that the appellant had contended that he had permitted this occupation as a favour to the respondent because the latter had struggled to find accommodation.
 5. The appellant had admitted that he was a sole member of the corporation and that he had provided periodic financial contributions to the business operation and had attended to the premises of the business.
 6. The appellant admitted that he had controlled the business and held ownership of the vehicles which are the core of the operations of the business which provided a shuttle service;
 7. The appellant admitted that he had advised the respondent about his dismissal and offered to pay him retrenchment package;
 8. The appellant had offered to sell LOG and its business to the respondent.
- [11] On the basis of this evidence, the court *a quo* concluded that 'Prinsloo [the respondent] had discharged the evidential basis to disregard the company's separate personality and a case has been made out as to why the corporate veil in respect of Wilson [the appellant] should be lifted'.

The appeal

- [12] The appellant's counsel submitted that the court *a quo* had committed a number of errors of fact. It had erroneously found that the appellant had been cited as a party to the arbitration proceedings, whereas the evidence showed clearly that while the papers submitted to the CCMA had referred to the appellant as a contact person, the appellant had elected not to participate in the arbitration proceedings and no finding had been made against him by the

arbitrator. In addition, much of the factual findings of the court a quo turned on the level of participation of appellant in the business of the LOG, whereas his entire explanation was based on the contention that he was not involved in the day to day running of the business. These daily business operations had been controlled by Mr Stewart.

- [13] In addition, the appellant's counsel contended that there was no evidence which suggested that this version did not constitute a genuine dispute of fact of a kind that had to be dispositive in a case brought by way of affidavits. In this regard, the appellant's counsel referred to what Heher JA said in *Wightman t/a JW Construction v Headfor (Pty) Ltd and another* 2008 (3) SA 371 (SCA) at para 13:

'A real genuine and bona fide dispute of fact can exist only when the court is satisfied that the party purports to raise the dispute has in his affidavits seriously and unambiguously addressed the facts said to be disputed. There will off course be instances where a bare denial meets the requirement because there is no other way open to the disputed party and nothing more can therefore be expected of him.'

- [14] The upshot of the submission was that the evidence as presented on the affidavits, and read holistically, did not provide a justification for finding that the explanation, that the appellant was not involved in the day to day running of the business, was so palpably and plausibly farfetched or untenable that it stood to be rejected without more.

- [15] The evidential disputes notwithstanding, the more significant problem for the purposes of deciding this appeal was the manner in which the court a quo sought to lift the corporate veil. There is, in my view, no general, free floating discretion available to a court to disregard a corporate entity's separate juristic personality, in this case that of a close corporation, other than to seek relief in terms of s 65 of the Close Corporation Act.

- [16] In *Cape Pacific Limited v Lubner Controlling Investments (Pty) Ltd and others* 1995 (4) SA 790 (A) 203, Smalberger JA citing *dicta* from *Dadoo Ltd and others v Krugersdorp Municipal Council* 1920 AD 530 to the effect that, given particular circumstances a court might disregard corporate personality. The decision is based on having regard to the substance rather than the form of things Thus Smalberger JA said:

‘Whatever the position, it is probably fair to say that a court has no general discretion simply to disregard a company’s separate legal personality whenever it considers it just to do so.’ (at para 29)

- [17] The learned judge went on to say at paragraph 31 that ‘where fraud, dishonesty or other improper conduct are found to be present other considerations will come into play. The need to preserve the separate corporate identity would in such circumstances have to be balanced against policy considerations which arise in favour of piercing the corporate veil.’ In this connection, the learned judge added that ‘if a company, otherwise legitimately established and operated, is misused in a particular instance to perpetuate a fraud or for a dishonest or improper purpose, there is no reason in principle or logic why its separate personality cannot be disregarded in relation to the transaction in question (in order to fix individuals responsible for personal liability) while giving full effect to it in other respects.’ (at para 33)

- [18] From these *dicta*, it is clear that, absent the application of s 65 of the Close Corporation Act, the respondent bore the onus to show that Expidor had been run by the appellant on the basis of fraud or that there was some other dishonest or improper purpose in the manner in which its affairs were conducted: in particular, with the intent or purpose of avoiding a legal obligation.

- [19] In the founding affidavit there is simply no evidence offered to make such a finding. No more than a series of unsubstantiated conclusions are contained in the respondent’s affidavit including:

'Wilson at all times and for a number of years assumed personal responsibility for the persistent losses and liabilities of Expidor until the time of my unfair dismissal at which time Wilson elected to distance himself from Expidors liability.

For years Wilson assumed personal responsibility for Expidor's liabilities until the time of my unfair dismissal at which time Wilson first indicated that I was employed by Expidor and not by him.

Expidor is simply the mere alter ego or business conduit of Wilson. Wilson's role, function and powers are those of Expidor. The only differentiation that can be made between the actions of Wilson and Expidor may be a document indicating that he CC had been registered.'

- [20] None of these conclusions provide the requisite evidence that the business was managed in a fraudulent manner or for some improper objective with a view to avoiding the obligations that Expidor might have owed towards the respondent or any other third party. Indeed, as I have indicated, the respondent stated in his founding affidavit that he was employed by LOG as Marketing Manager as from 4 March 2014. Further as the appellant noted in his answering affidavit:

'Nevertheless, assuming that Prinsloo is being truthful about when he became aware of the existence of the first respondent [Expidor], he gives evidence before the commissioner at the CCMA stating (according to the commissioner, and under oath) that 'the [first] respondent had used two different company registration numbers under the business name Expidor 163 CC and traded as the League of Gentlemen.'

- [21] None of this evidence provided by the respondent amounts to a 'gross abuse of juristic personality' which would justify a court applying its powers in terms of s 65 of the Close Corporation Act to declare that the corporation is deemed not to be a juristic person. The fact that the section was not invoked by the respondent in his cause of action only compounds the problem

[22] In summary, there is no evidential basis by which the court *a quo* could have held the appellant liable for an obligation which the respondent could not enforce against Expidor because the latter is insolvent.

[23] For these reasons, the appeal must succeed. The following order is therefore made:

1. The appeal is upheld with costs.
2. The order of the court *a quo* of 9 May 2019 is set aside and substituted with the following:

'The application is dismissed with costs.'

Davis JA

Jappie JA and Kathree Setiloane AJA concur.

APPEARANCES

FOR THE APPELLANT

Adv T Moller

Instructed by Johan Venter & Associates

FOR THE RESPONDENT

Willem Jacobs of Willem Jacobs & Associates