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IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN DURBAN

CASE NO: D1134/10

5 In the matter between:

CHANTECLER HOTEL

Applicant

And

JOHNNY SINGARAM

First Respondent

THE SHERIFF, PINETOWN

Second Respondent

10 **STANDARD BANK**

Third Respondent

JUDGMENT

CELE J

15 **Introduction**

[1] This is an application for the confirmation of a rule *nisi* granted by this Court on 2 December 2010. The applicant sought to have an order issued basically in the following terms:

1. Pending the outcome of the application the third respondent,
20 Standard Bank, are hereby interdicted and restrained forthwith from paying out of the fund held by it namely R125 789.44 to any party pursuant to the warrant of execution served upon them.
2. An order was sought that it be ordered that the third

respondent retains the abovementioned funds in their possession until final determination of the matter.

[2] The first respondent then filed his opposing papers on the very day the matter was heard. It was only today that the applicant filed its replying affidavit. The matter has been argued upon by both parties and is now proceeding. It would appear that the facts are essentially common cause between the parties.

[3] I may just thank Mr van Niekerk SC who appears for the first respondent who has summarised the facts. I will follow that summary as it has been conceded even at the very beginning of these proceedings by both parties that the facts are essentially common cause between them.

15 **Background facts**

[4] The first respondent was employed by the Chantecler Hotel as a barman. He was charged with an act of misconduct which led to his dismissal on 9 February 2005. That is about six years ago. He then referred an unfair dismissal dispute to the CCMA in which he claimed that he wanted to be reinstated because of the unfair dismissal. The hearing, that first hearing, proceeded in the absence of an employer and the award was then issued by Commissioner Subramoney on 15 March 2005.

25 [5] The employer brought an application for the rescission of the

arbitration award with success and that award was then set aside. The matter was rescheduled for hearing. The employer in those proceedings was then described as Chantecler Hotel and School of Food and Wine. In the affidavit filed in support of the application the applicant was described as a partnership. As I have indicated rescission was then granted and it came before Commissioner Sullivan on 12 July 2005. In that arbitration the first respondent's employer was cited as Norbit Gram trading as Chantecler Hotel. It would appear that during the arbitration hearing the legal representative for Mr Gram told the commissioner that the respondent was Chantecler Hotel which at the moment is owned by Mr Nobit Gram.

[6] At the end of the hearing the commissioner found for the first respondent and ordered Mr Gram to pay the first respondent the sum of R18 000 in cash and also ordered him to reinstate the first respondent. According to the first respondent he tendered his duties and on that day he found Mr Gram but Mr Gram walked away and later he was not allowed to tender his services. On the papers again it would appear that according to the applicant there is an issue about whether or not the first respondent tendered his services but that issue does not call for a decision by this Court.

[7] The employer then filed an application to review the arbitration award granted against it with no success. What then happened, as the

review application had been dismissed, was that the first respondent sought to execute in terms of the arbitration award issued in his favour. The award was clearly issued in the names of Mr Gram and not issued against the Chantecler Hotel CC or the Chantecler CC.

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[8] In the proceedings before me it is clear that Mr Gram has not been cited as a party. I point this out specifically because the award was issued against him. As the matter was presented before me I did pose a question to Mr van Niekerk as to what probably would have happened had the execution been made against the account of Mr Gram in terms of the award and if one would be sitting with this matter. He referred me to a letter that was issued by the employer's organisation. It is on page 63 of the papers. It reads as follows:

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"Thank you for the Court order and Arbitration Award forwarded to us by normal post, received by us on 23rd October 2009. I must mention in the interim I have managed to touch base with the owner of the Hotel one Mr Norbet Gram who is presently residing in Dubai. My instructions from him are that he understands that he has to pay the R18 000.00 as per the Award, however, in terms of R3 000 per month, he has a problem with this from the point of view that Johnny Singaram at no point in time ever tendered his services at the Hotel, in fact he has not heard a word from Johnny since the Arbitration."

[9] Mr van Niekerk has argued that from the information that could be gathered by the first respondent Mr Gram is not residing in this country and that any attempt to execute against his personal account will clearly therefore be frustrated. He has in his heads of argument asked me to do or to apply the principle that is called a piecing of the corporal veil and then to refuse to grant the order that is sought.

[10] On the contrary the applicant argues that the simplest of the procedures that could have been followed by the first respondent would have been to apply for the joinder of Mr Gram in this case. The applicant argues that Mr Gram is not before Court, the applicant cannot therefore be called upon to answer for his case because he has not been given a chance to be heard in this court.

[11] I return then to the applicability of the principle lying in the piecing of the corporal veil. I have been referred by Mr van Niekerk to the decision in *Shipping Corporation of India Ltd v Evdomon Corporation* 1994 [1] SA 550 with particular reference to pages 565 and 566. The relevant portion starts with a reference to the decision by INNES CJ in that *Dadoo Ltd and Others v Krugersdorp Municipal Council* 1920 AD page 530 at 550 which reads as follows:

"A registered company is a legal persona distinct from the members who compose it. In the words of Lord MacNaghten (Salomon v Salomon & Co 1897 AC at p 51), 'the company is at law a different person altogether from the subscribers to its memorandum;

and though it may be that, after incorporation, the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or a trustee for them.' That result follows from the separate legal existence with which such corporations are by statute endowed, and the principle has been accepted in our practice. Nor is the position affected by the circumstance that a controlling interest in the concern may be held by a single member. This 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; property vested in the company is not, and cannot be, regarded as vested in all or any of its members."

"It seems to me that generally it is of cardinal importance to keep distinct the property rights of a company and those of its shareholders even where the latter is a single entity and that the only permissible deviation from this rule known to our law occurs in those [in practice] rare cases where the circumstances justify piecing or lifting the corporate veil. And in this regard it should not make any difference whether the shares be held by a holding company or by a government. I do not find it necessary to consider or attempt to define the circumstances under which the Court will piece a corporate veil. Suffice it to say that

they would generally have to include an element of fraud or other improper conduct in the establishment or use of the company or the conduct of its affairs. In this connection the words device, stratagem, cloak and sham have been used."

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- [12] I have referred to the evidence of instances when the employer was referred to as the Chantecler Hotel, in some instances Chantecler Hotel CC. I have made reference to the employer being referred to as Chantecler Hotel and School of Food and Wine but these references do not appear to me to have been made use of in any improper manner. There is nothing untowards that suggests that the use of these names was intended to frustrate any attempt at hiding the actual true identity of the employer. I have also seen various documents in the file. One of them relates to the professional reservation at a hotel. That shows that the employer had a Standard Bank account under the name Chantecler Hotel. It is account number [.....] which is the account against which execution is sought to be made.
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- 20 [13] I am unable to find as suggested in favour of the first respondent that this is a case where the piecing of the corporate veil is called for. This is a case where the first respondent could easily have attempted to execute against the account of Mr Gram and if there were any problems with that kind of execution then and only would one begin to find that there might be a problem on how the company was operating because as we stand it may just very well be that Mr Gram has all the
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property he needs in this country against which execution will be rendered. If the first respondent had any problems in anticipation of a proper execution one would have expected therefore that the first respondent would have sought to amend the award so that it be issued against what he considers to be the true employer.

[14] In my view this is not a case where the unveiling of the corporate veil is called for. Therefore the application is dismissed.

[15] Therefore:

1. The Rule *nisi* is confirmed
2. The first respondent is therefore called upon to pay the costs at attorney and client scale.

CELEJ

DATE OF HEARING	:	7 February 2011
DATE OF JUDGMENT	:	7 February 2011

APPEARANCES

FOR THE APPLICANT	:	Adv Z Oliver
Instructed by	:	MACRITCHIE ATTORNEYS

FOR THE RESPONDENT	:	Adv G O van Niekerk SC
Instructed by	:	DERICK JAFTHA & PARTNERS