



REPUBLIC OF SOUTH AFRICA

LABOUR COURT, JOHANNESBURG

CASE NO: JR 2661/2007

Not Reportable

In the matter between –

CHARLES BALOYI

Applicant

And

JD MALHERBE

First Respondent

**UNITED SECURITY
SERVICES (PTY) LTD**

Second Respondent

Heard: 12 September 2013

Delivered: 21 January 2015

**Summary: Application to pierce the corporate veil of the close corporation.
The principles applicable in piercing the corporate veil restated.**

JUDGMENT

MOLAHLEHI J

Introduction

- [1] There has regrettably been an excessive delay in finalising this judgement which was occasioned by an error in what was recorded on the Court file cover. It is recorded on the file cover that the matter was postponed *sine die* on 12 September 2013 to afford the respondents the opportunity to file a condonation application for the late filing of their response. This occurred in the context where the applicant's counsel was insisting that the Court should not consider the respondent's paper because no condonation application was made by the respondents. After making the order postponing the matter *sine die* the Court accepted the plea of the applicant's counsel that the matter should not be postponed because there has been an excessive delay in finalising this matter.
- [2] This is an application in terms of which the applicant seeks a declaratory order to have the first respondent held jointly and severally liable for the indebtedness of the second respondent towards him.
- [3] The respondents have also applied for condonation for the late filing of their statement of response. The applicant had initially opposed the condonation application. The respondents were two days late in filing their statement of response and this occurred in circumstances where there had been a request in writing to the applicant for an indulgence with regard to the delay in filing the same. .
- [4] In the circumstances of this case I accepted the application for condonation from the bar made by counsel for the respondents. In considering the application I am of the view, taking into account the period of the delay that it is in the interest of justice that the delay should be condoned.

Background facts

- [5] The applicant is the former employee of the second respondent who subsequent to his dismissal instituted unfair dismissal proceedings against the second respondent. He was successful in his unfair dismissal claim and was accordingly awarded compensation in the amount of R16 390,00 in terms of the arbitration award made under case number GAPT2627-07.
- [6] The second respondent, a company registered in terms of the company law of South Africa challenged the outcome of the arbitration award by filing a review application. The review application was dismissed due to unreasonable delay on the part of the second respondent.
- [7] The applicant sought to enforce the arbitration award but was unsuccessful because the second respondent was deregistered. Thereafter, the applicant launched proceedings in the High Court in terms of section 73(5) of the repealed Companies Act of 1973. The application was withdrawn because according to the applicant the second respondent was re-registered.
- [8] The applicant instituted the present proceedings because the second respondent has failed to effect payment of the amount as ordered by the arbitration award. The applicant alleges that the second respondent is unable to comply with the arbitration award because it does not own any assets capable of attachment neither does it have a bank account.
- [9] The applicant contends that the delay by the first respondent in complying with the arbitration award is nothing but a stratagem intended to frustrate the enforcement of the award and is also an abuse of the juristic personality of the second respondent by the first respondent.
- [10] The issue which the Court is required to determine is whether the corporate veil of the second respondent should be pierced and that the first respondent be held personally liable for the indebtedness of the second respondent.

[11] In seeking to persuade the Court to pierce the corporate veil the applicant's counsel argued that an inference should be drawn from the following facts that the conduct of the respondents was reckless:

- a. The delay and failure to comply with the arbitration award made in favour of the applicant.
- b. Failure by the respondents to comply with the tax law which resulted the de-registration of the second respondent.
- c. The second respondent does not have a bank account or assets.

The legal principles

[12] It is trite that a company or a close corporation have a distinct and separate personality in law from its directors. Thus the directors are not held personally liable for the debts of the company or the close corporation. The exception to this general rule applies where the Court pierces the corporate veil.

[13] As stated in *Zeman v Quikelberge and Another*,¹ the piercing of the corporate veil "means disregarding the dichotomy between the company and the natural person behind it and attributing liability to that person where he has misused or abused of corporate personality."

[14] Whilst it is accepted that a Court does not have a general discretion to disregard the separate corporate identity of a company or closed corporation from the individuals responsible for its running, it is trite that in piercing the corporate veil the Court exercises a discretion. It has also been generally accepted that the piercing of the corporate veil is "an exceptional procedure."² There is however no definite test as to the circumstances under which a Court can exercise the discretion to pierce the corporate veil.³ The Courts have however over the years developed guidelines to follow in considering an application to pierce the corporate veil.

¹(2011) 32 ILJ 453 (LC).

² See *Airport Cold Storage [pty] Ltd v Ebrahim and others* 2008 [2] SA 303 [C].

³ See *Amlin (SA) Pty Ltd v Van Kooij* 2008 (2) SA 558 (C), quoting from *Briggs v James Hardie & Co Pty Ltd* (1989) 16 NSWLR 549 (NSWCA), where the Court held that: '(T)here is no common, unifying principle, which underlies the occasional decision of the courts to pierce the corporate veil. Although an ad hoc explanation may be offered by a court which so decides, there is no principled approach to be derived from the authorities.'

- [15] In *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd and Others*,⁴ Smalberger JA held that:

“The law is far from settled with regard to the circumstances in which it would be permissible to pierce the corporate veil. Each case involves a process of enquiring into the facts, which, once determined, may be of decisive importance...I do not deem it necessary or advisable in the present appeal to attempt to formulate any general principles with regard to when the corporate veil may be pierced.”

- [16] The same approach was adopted in *ADT Security (Pty) Ltd v Botha and Others*,⁵ where the Court held that:

“Much will depend on a close analysis of the facts of each case, considerations of policy and judicial judgment. Nonetheless what, I think, is clear is that as a matter of principle in a case such as the present there must at least be some misuse or abuse of the distinction between the corporate entity and those who control it which results in an unfair advantage being afforded to the latter.”

- [17] In *The Shipping Cooperation of India Ltd v Evdoman Corporation and Another*,⁶ Cobett CJ after indicating that he did not find it necessary to attempt to define the circumstances in which the Court would pierce the corporate veil, held that those circumstances will include where there is, “fraud or other improper conduct in the establishment own use of the company or the conduct of its affairs.”

⁴ (1995) 2 SA 543 (A).

⁵ [2010] ZAWCHC 563, at para.17.

⁶ 1994 [1] SA 550 [A] at page 566 F-C.

- [18] The general approach to adopt when dealing with an application to pierce the corporate veil has been summarised by Steenkamp J, in *Zeman Quicklberge and Another*,⁷ in the following terms:

“[29] The courts will generally require an element of fraud or other improper conduct before they will pierce the corporate veil. In these circumstances a court will then be entitled to look to substance rather than form in order to arrive at the true facts. The court does not require *unconscionable injustice*” for determining whether the veil should be pierced as formulated in ***Botha v Van Niekerk*** and found it perhaps too rigid a test. The court opted for a more flexible approach allowing the facts of each case ultimately to determine whether the piercing of the veil is called for.

[30] There is no reason why piercing of the corporate veil should necessarily be precluded if another remedy exists. As a general rule if a person has more than one legal remedy at his disposal he can select anyone of them and he is not obliged to pursue the one rather than the other. If the facts of a particular case otherwise justify piercing the veil the existence of another remedy and the failure to pursue it available remedy should not in principle serve as an absolute bar to a court granting relief.

[31] Existence of another remedy or the failure to pursue it may be a relevant factor when policy considerations come into play but cannot be of overriding importance.”

- [19] In the recent case of *Ex Parte: Gore NO and Others*⁸ (in their capacities as the liquidators of 41 companies comprising King Financial Holdings Ltd (in liq.) and its subsidiaries), in the Cape High Court case number: 18127/2012, the Court held that:

“[28] A consideration of the South African authorities shows that despite the repeated affirmation that the courts enjoy no general discretion to do so merely because it would be just and equitable, courts will ignore or look behind the separate legal personality of a company

⁷ See footnote 1 above.

⁸ (2013) 2 SA 437 (WCC)

where justice requires it, and not only when there is no alternative remedy. The involvement of fraud or other improper conduct has generally been present in the cases in which the veil has been lifted or pierced”.

Evaluation

- [20] It is common cause that the first respondent is the sole director of the first respondent. The amount due and owing to the applicant is also common cause.
- [21] The applicant's case in the present matter is that the first respondent abused the juristic personality of the second respondent by de-registering it when an attempt was made to enforce the arbitration award. He further contends that the first respondent re-registered the second respondent when confronted with the High Court application.
- [22] It is common cause that the second respondent was de-registered. The first respondent in his answering affidavit says deregistration was not initiated by him and that it took place without his knowledge. This was not disputed by the applicant.
- [23] The respondent has disputed that the re-registration was done to circumvent the High Court litigation which the applicant had instituted. There is in my view insufficient evidence to conclude that the motive for re-registering the second respondent was to avoid the case which the applicant had instituted in the High Court. On the papers before me the probabilities support the version of the respondents that the re-registration was done soon after compliance with the tax requirements.
- [24] I do accept however that failure by the second respondent to comply with the arbitration award made in favour of the applicant is unacceptable. I do not however believe that it provides a sufficient basis to take the exceptional step of piercing the corporate veil. It should be noted that the arbitration award has not been made an order of the Court in terms of section 158 (1) (c) or certified as an order of the Court in terms of section 143 of the Labour Relations Act 66 of 1995.

[25] The circumstances of this case are different to those in *Zeman v Quickelberge and Another*,⁹ which was submitted in Court by counsel of the applicant. In that case the matter served before the Court on an unopposed basis. The facts upon which the Court drew an inference from, revealed that the sale of the close corporation, in that case, was done with a fraudulent purpose or as an abuse of the corporate personality. In this respect the Court found that sale of the close corporation was done as a disposition without value.

Conclusion

[26] In my view, having considered the facts and the circumstances of this case, the applicant has failed to make out a case justifying the piercing of the corporate veil. There is insufficient information before this Court to warrant the piercing of the corporate veil particularly when regard is had to the fact that the case of the applicant was based mainly on the de-registration of the second respondent. In this regard there is no evidence of fraudulent or reckless conduct on the part of the respondents or any other person responsible for the running of the affairs of the second respondent. Accordingly the applicant's application stands to fail. It would however not be fair in the circumstances of this case to allow costs to follow the results.

Order

[27] In the premises the applicant's application is dismissed with no order as to costs.

E MOLAHLEHI

Judge of the Labour Court Johannesburg

⁹ See footnote 6 above.

Appearances:

For the Applicant : NP Voyi from Ndumiso Voyi Incorporated.

For the Respondent : Saunders Te Boekhorst Inc.

LABOUR COURT