IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG CASE NO: J 1870/05

In the matter between:

MADELEINE ESTERHUIZEN

Applicant

and

MILLION-AIR SERVICES CC (IN LIQUIDATION) First Respondent

MILLION-AIR SERVICES CARLETONVILLE (PTY) LTD Second Respondent

ROBERT IHLENFELDT Third Respondent

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION Fourth Respondent

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JUDGMENT

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FRANCIS J

Introduction

1. This is an application to declare that the second respondent is the same business operations as the first respondent and is liable, jointly and severally with the third respondent, to pay the amount awarded to the applicant in a CCMA award under case number GA17181/02. Further that it be declared that the third respondent was the real employer of the applicant and that he is liable, jointly and severally with the second respondent, to pay the amount awarded to the applicant in the CCMA award under case number GA17181/02.

2. The application was opposed by the second and third respondents.

Background facts

3. The applicant was employed by the first respondent from 19 July 1999 to 11 June 2001. She resigned and referred a constructive dismissal dispute to the CCMA, citing the first respondent as her employer, alleging that her forced resignation constituted an unfair dismissal as contemplated by section 186(e) of the Labour Relations Act 66 of 1995 (the LRA).

4. The CCMA convened a conciliation meeting in terms of the LRA. There was no appearance on behalf of the first respondent and the commissioner issued a certificate to the effect that the dispute remained unresolved. The applicant then referred the dispute for arbitration, which was held on 24 March, 3 and 5 August 2003. There was no appearance on behalf of the first respondent. The commissioner issued an award on 5 August 2003 in terms of which he found that the applicant had been unfairly dismissed and ordered the first respondent to pay her compensation in the amount of R88 912.95.

5. The award was certified as an award in terms of section 143(3) of the LRA and a warrant of execution (writ) was issued on 5 February 2004. The deputy sheriff attempted to serve the writ on the first respondent at its business address in Carletonville on 4 March 2004. As appears from the return of service, the third respondent presented himself as the branch manager of the second respondent and informed the deputy sheriff that the first respondent had been liquidated. The deputy sheriff attached to the return of service a copy of a Certificate of Incorporation which shows that the second respondent was incorporated on 27 February 2003.

6. The applicant claims that after she had referred the dispute to the CCMA, she had contacted the third respondent on a number of occasions, during which he swore at her and told her that he did not care about the CCMA and that he would not comply with any award that the CCMA might make. The third respondent denied this. The applicant also contacted the third respondent several times after the award had been issued. He told her on each occasion that he had no intention of complying with the award.

7. The third respondent was the sole member of the first respondent. On 1 May 2003 he was the sole director of the second respondent and contends that he is now employed by the third respondent as a branch manager.

8. The applicant than brought the application referred to in paragraph one above.

The points in limine

9. The second respondents raised the following points *in limine:*

    9.1 It is not legally competent for this Court to grant the relief sought, since neither the second nor the third respondents had been parties to the arbitration proceedings and that neither of them had the opportunity to defend themselves against the allegations made by the applicant in those proceedings.

    9.2 The first respondent has not been properly cited or served in these proceedings. Despite alleging (correctly) that first respondent is in liquidation, the applicant has not cited the liquidator, or serve upon him.

Accordingly the first respondent is not properly before the Court. The first respondent has been finally liquidated and the liquidation process has been finalised. The applicant has given no reason why she failed to institute a claim against the liquidator in respect of the award.

9.3 It was contended that this Court cannot grant the relief sought in that is not a Court as defined in section 1 of the Close Corporation Act in relation to any corporation in terms of section 7. Therefore this Court does not have jurisdiction to declare third parties liable for the debts of a close corporation where the circumstances envisaged in section 64 and 65 of the Close Corporation Act are alleged to exist. The ambit of the Labour Court's jurisdiction is set out in section 157 of the LRA, which confers on it ".... exclusive jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other law is to be determined by the Labour Court". The joint or separate liability of third parties who are not joint employers of an employee, is not such a matter.

Analysis of the facts and arguments raised

10. The applicant had initially sought an order to make the award an order of court in terms of section 158(1)(c) of the LRA and the declarator orders referred to in paragraph one above. The first prayer was abandoned on the basis that the award was certified in terms of section 143 of the LRA. It becomes unnecessary to decide the second point *in limine* since the applicant is not persisting to make the award and order of court in terms of section 158(1)(c) of the LRA.

11. There is also no substance in the first point *in limine*. A similar defence was raised in the matter of *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* 1995 (4) SA 790 and was rejected by the court at page 806 F - H as follows:

"The respondents' arguments in this respect does not, in my view, assist them in the present matter. I consider the appellant to be correct in contending that it has a judgment debt against LCI which it is entitled to follow and enforce against both GLI and Lubner. That it can do so is a logical consequence of piercing the corporate veil and disregarding the separate juristic personalities of LCI and GLI. To hold otherwise would be to negate the very reason for piercing the veil. In casu the facts establish that, in relation to the dealings with the Findon shares, Lubner was both LCI and GLI. Accordingly, the judgment against LCI was in substance and effect one against Lubner. It should therefore be effective against Lubner in any guise. Once that basic truth is asserted, it matters not that GLI and Lubner was there in his LCI hat, and it is idle and unrealistic to suppose that in his GLI and Lubner were not formally parties to the original action or influenced its outcome. Once therefore the sale of the Findon shares by LCI to the appellant was proved in the original action, and the corporate veils of LCI and GLI pierced in the present, effect can be given to the judgment in the original action against all three respondents."

The second and third respondents conceded that the applicant has provided an answer to their first point *in limine* and was not proceeding with it. The concession was well made in my view.

12. This brings me to the third point *in limine* which relates to whether this Court is competent to grant the relief that the applicant is seeking. There is no substance in the second and third respondents' contentions. The applicant is seeking a declaratory

order in terms of section 158(1)(a)(iv) of the LRA. This Court can only issue a declaratory order if it has jurisdiction regarding the subject matter of the prayers. In this regard see *SA Chemical Workers Union v Engen Petroleum Ltd & another* (1998) 19 ILJ 1568 (LC) AT 1570B-C. The prayers concern the enforceability of an arbitration award and the ability of the applicant to have it executed. This court issued the writ. The subject matter therefore falls clearly within the ambit of the jurisdiction of this Court and the orders sought are clearly ancillary to or incidental to the function of this court to enforce arbitration awards. They fall within the provisions of section 158(1)(j) of the LRA.

13. The second and third respondents also raised the issue that the applicant should have sought relief in terms of sections 64 and 65 of the Close Corporation Act. Section 64 deals with reckless or grossly negligent carrying on of the business of a close corporation or the carrying on with the intent to defraud a person. The fraud or manipulation that is the cause for this application has nothing to do with the carrying on of the business. It relates to the liquidation thereof. Section 64 is not applicable. Section 65 is similarly not applicable. The second and third respondents' counsel contended that the entity against whom the applicant should have instituted these proceedings, is the first respondent. The section affects the following conduct:

13.1 The incorporation of the corporation. There was in my view nothing untoward about the incorporation of the corporation. It was incorporated for the purpose of conducting the business it conducted.

13.2 Any act by or on behalf of the corporation. The liquidation of the first respondent is not an act by the corporation or on behalf of the corporation. It

can be liquidated by its members, or by its creditors. These are not acts by the corporation or on behalf of the corporation. If one looks at what a court in such circumstances may declare, it is clear that the liquidation is not intended as an act by or on behalf of the corporation. It may declare that the corporation is not a juristic person in respect of certain rights specified in the declaration. The purpose of the winding-up of a corporation is to bring its juristic personality to an end.

13.3 Any use of that corporation. The winding-up of a corporation is not a use of that corporation.

In my view, even if these remedies were available to the applicant, and she did not pursue them, such failure to do so is not fatal and does not prevent her from pursuing other remedies. In this regard see *Cape Pacific Ltd supra* at page 806 F - H.

14. The second and third respondents have contended that insofar as the applicant is seeking relief declaring that the second and third respondents are declared to be jointly and severally liable to pay the award against the first respondent, and insofar as such application is not based on an allegation that the second and third respondents were also her employers, it was not competent for this Court to grant such relief. These contentions are baseless.

15. This brings me now to the crux of the matter. This relates to the piercing of the corporate veil. It is trite law that a registered company is a legal persona distinct from the members who compose it. See *Dadoo Ltd and Others v Krugersdorp Municipal Council* 1920 AD 530 at 550. Equally trite is the fact that a court would be justified

in certain circumstances in disregarding a company's separate personality in order to fix liability elsewhere for what is ostensibly acts of the company. The focus then shifts from the company to the natural person behind it or in control of its activities as if there were no dichotomy between such person and the company. In that way personal liability is attributed to someone who misuses or abuses the principle of corporate personality.

16. In the matter of *Cape Pacific Ltd supra*, it was held at page 802 paragraphs G - I as follows:

"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. And in determining whether or not it is a legally appropriate in given circumstances to disregard corporate personality, one must bear in mind

'The fundamental doctrine that the law regards the substance rather than the form of things - a doctrine common, one would think, to every system of jurisprudence and conveniently expressed in the maxim plus valet quod agitur quam quod simulate concipitur'.

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 page 803 and 804 paragraphs E - J and A - C it was held that:

"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 justifying "piercing" 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 pierce the 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....."

Two matters arising from the quoted passage merit further comment. First, reference is made to 'those in practice rare cases where the circumstances justify "piercing" or "lifting" the corporate veil'. It is undoubtedly a salutary principle that our Courts should not lightly disregard a company's separate personality, but should strive to give effect to and uphold it. To do otherwise would negate or undermine the policies and principles that underpin the concept of separate corporate personality and the legal consequences that attach to it. But where fraud, dishonesty or other improper conduct (and I confine myself to such situations) is 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 ..... And a court would then be entitled to look to substance rather than form in order to arrive at the true facts, and if there was a misuse of corporate personality, to disregard it and attribute liability where it should rightly lie. Each case would obviously have to be considered on its own merits.

The second is the reference to the inclusion of 'an element of fraud or other improper conduct in the establishment or use of the company or the conduct of its affairs'. (My emphasis.) It is not necessary that a company should have been conceived and founded in deceit, and never have been intended to function genuinely as a company, before its corporate personality can be disregarded (as appears in some respects to have been the view of the trial Judge - see the judgment at 821 G - J). As Gower (op cit) states (at 133):

'It also seems clear that a company can be a facade even though it was not originally incorporated with any deceptive intention; what counts is whether it is being used as a facade at the time of the relevant transactions,'

Thus if a company, otherwise legitimately established and operated, is misused in a particular instance to perpetrate 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 the individual or individuals responsible with personal liability) while giving full effect to it in other respects. In other words, there is no reason why what amounts to a piercing of the veil pro hac vice should be permitted."

17. The business of the third respondent has been in existence since 1996 and it is still carrying on the same business at the same premises, although under the guise of different corporate identities. The business never closed down and it never interrupted trade. It is clear from the facts that the third respondent was the sole member of the first respondent. The third respondent has stated in paragraph 5 of the answering affidavit that *"since the transfer of the business from first respondent to*

second respondent pre-dated the arbitration award in question, as will be seen below, there is no ground for alleging that first respondent or I am attempting to frustrate applicant's enforcement of the award." It has not been explained why such a transfer took place and what the reason for the transfer was. The date of transfer has not been provided to this Court.

18. It was further pleaded at paragraph 10 of the second and third respondents answering affidavit that the change in corporate identity came about during 2003 when the first respondent was liquidated and companies incorporated to run each branch which the first respondent had at that stage. Second respondent was incorporated to run the Carletonville business and purchased first respondent's assets. A Purchase Agreement (agreement) was annexed to the answering affidavit which was between Million-Air Services (Pty) Ltd and the second respondent. In terms of the said agreement the Million-Air Services (Pty) Ltd remained liable for the liabilities. As at 1 May 2003 the third respondent was cited as a director of the second respondent and resigned on that date. Marie Jacqueline Marilyn Butler became the new director. Clause 40 of the agreement deals with the liabilities and records that the purchaser will not take over any liabilities of the seller. The seller undertook properly to discharge all the liabilities of the business as on the effective date therefor and indemnify the purchaser accordingly. The seller is described as Million-Air Services (Pty) Ltd. The purchaser is described as Million-Air Services Carletonville (Pty) Ltd but the parties are described as Million-Air Services Carletonville (Pty) Ltd and Marie Jaquline Marilyn Butler. It appears from this agreement that there is a further entity called Million-Air Services (Pty) Ltd. It is unclear who the director of this company

is. The third respondent has not dealt with this company in his answering affidavit at all. This company sold its Carletonville business to the second respondent which in turn sold its Cape Town business to Butler. The third respondent was the sole director of the second respondent up to 1 May 2003 and than conveniently became a manager after the sheriff had attempted to execute. The reasons for doing so must be obvious.

19. The third respondent had worked with the applicant. She resigned due to him, having made her continued stay intolerable. He attended some of the hearings at the CCMA. He had applied to have the first respondent liquidated and was the vehicle behind the first and second respondent. It appears from the letterheads of the first and second respondents that the addresses and details of the branches of the first and second respondents are identical, except that the second respondent seems to have in the mean time acquired a branch in Cape Town and the branches had been converted to private companies. According to the first respondent's letterhead, the third respondent was the sole member of the first respondent. According to a company search conducted on 15 September 2005 the third respondent was the sole director of the second respondent.

20. The applicant alleges that the third respondent has fraudulently abused the corporate personality of the first respondent to frustrate paying the award in her favour. It is unclear why the first respondent was liquidated and than the second respondent established to run the same activities that were run by the first respondent. In the applicants founding affidavit it was contended in paragraphs 20 to 22 as follows:

"20. I have been advised that the inference to be drawn from the above facts is that the second respondent is the same business operation as the first respondent, operating under a different corporate veil, and that it is responsible for the payment of the amount awarded to me.

21. I have further been advised, in the alternative, that the third respondent was my real employer and that he is hiding behind different corporate veils from time to time. He has abused the legal identity for the payment of the amount awarded to me. I have been advised that this is an appropriate case for piercing the corporate veil.

22. I have further been advised that it should be inferred that the first respondent has converted from a close corporation to a private company and that they are one and the same legal entity."

The second and third respondents did not deal with this at all in their answering affidavit.

21. The evidence not only establishes that the third respondent knew of the applicant's claim, and that he appreciated that it was a valid one, and that the liquidation of the first respondent was a device or stratagem resorted to by him in a deliberate attempt to thwart the applicant's right to enjoyment of her award. His conduct in the circumstances, if not fraudulent, was at the very least gravely improper. The liquidation of the first respondent by the third respondent was an attempt to avoid liability by the first respondent. It was carried out for an improper purpose. The third respondent has not been candid with this court about what the true reasons for the first respondent's liquidation was. There is no doubt in my mind that the improper purpose was to evade its legal obligations. Policy considerations strongly suggest that

the veil of corporate personality be pierced in this matter to reveal the third respondent as the true puppet master in this case. It appears that the first respondent was liquidated and the second respondent formed to facilitate the evasion of the legal obligations. The first respondent was liquidated to defeat the applicant's claim in terms of the arbitration award. The third respondent had absolute control of the first respondent and the second respondent. He juggled the first and second respondents around like puppets to do his bidding as a puppet master. He was the common denominator in the applicant's dismissal, the liquidation of the first respondent, the incorporation of the second respondent and the attempted avoidance of the applicant's claim.

22. The award against the first respondent was in fact against the third respondent. It should therefore be effective against the third respondent in any guise.

23. It was held in *Footwear Trading CC v Mdlalose* (2005) 26 ILJ 443 (LAC) at page 450 at paragraph 34:

"The abuse of juristic personality occurs to frequently for comfort and many epithets have been used to describe the abuse against which the courts have tried to protect third parties, namely puppets, shams, masks and alter ego. However, the general principle underlying this aspect of the law of the lifting of the veil is that, when the corporation is the mere alter ego or business conduit of a person, it may be disregarded. The lifting of the veil is normally reserved for instances where the shareholders or individuals hiding behind the corporate veil are sought to be made responsible. I do not see why it should also not apply where companies and close

corporations are juggled around like puppets to do the bidding of the puppet masters - in this instance Mr Stanley Kotkin.

24. The dictum referred to in paragraph 23 above applies equally to this case.

25. The application stands to be granted. There is no reason why costs should not follow the result.

26. In the circumstances I make the following order:

26.1 The second respondent is the same business operations as the first respondent and is liable, jointly and severally with the third respondent, to pay the amount awarded to the applicant by in the CCMA award under case number GA17181/02.

26.2 The third respondent was the real employer of the applicant and is liable, jointly and severally with the second respondent, to pay the amount awarded to the applicant in the CCMA award under case number GA17181/02.

26.3 The second and third respondent's are to pay the costs of the applicant's application.

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FRANCIS J

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

FOR THE APPLICANT	:	J HIEMSTRA SC INSTRUCTED BY JOOSTE SLABBERT & MOODIE ATTORNEYS
FOR 2ND AND 3RD RESPONDENTS	:	R G BEATON INSTRUCTED EDWARD HOBBS ATTORNEYS
DATE OF HEARING	:	20 FEBRUARY 2007
DATE OF JUDGMENT	:	16 MARCH 2007